FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 18 1961
[illegible] BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 257

H. K. PORTER COMPANY, INC., *et al.*,
Appellants,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,
Appellees.

No. 258

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,
Appellees.

No. 266

UNITED STATES,
Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF VERMONT

BRIEF FOR THE CENTRAL VERMONT RAILWAY, INC., *ET AL.*

J. EDGAR MCDONALD,
466 Lexington Avenue,
New York 17, New York,
Attorney for Appellees.

Of Counsel:

J. RAYMOND HOOVER,
Metropolitan Bank Bldg.,
Washington 5, D. C.

WILLIAM H. PARSONS,
Warner Bldg.,
13th & E Streets, N. W.,
Washington 4, D. C.

HORACE H. POWERS,
Railroad Terminal Bldg.,
St. Albans, Vermont.

JOHN F. REILLY,
750 Third Avenue,
New York 17, N. Y.

WILLIAM F. ZEARFAUS,
Transportation Center,
Six Penn Center Plaza,
[illegible] 4, Pa.

TABLE OF CONTENTS

PAGE

STATUTES INVOLVED 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. The assailed rates are not within the purview of the Interstate Commerce Act, and are beyond the jurisdiction of the Interstate Commerce Commission 10

II. Even if the statute gives the Interstate Commerce Commission limited jurisdiction, the ultimate findings and the order of the Commission are nevertheless invalid, and the Commission has abused its administrative discretion 21

A. The Commission's Ultimate Findings Are Invalid 21

B. The Order of the Commission Is Invalid 25

C. The Commission Abused Its Discretion 29

III. The contentions of the appellants are without merit 32

A. The Contention of the United States 33

B. The Arguments of the Interstate Commerce Commission 37

1. The Jurisdiction of the Commission Under Section 3(1) 37

2. The Jurisdiction of the Commission Under Section 1 41

C. The Arguments of the Intervenors 53

PAGE

1. The Interstate Commerce Act Does Apply From the International Border to the Interior Points in the United States 53
2. There Has Been No Showing That the American Railroads Failed to Satisfy Their Statutory Duty to Establish Just and Reasonable Rates From The International Border 55
3. The Commission Lacked Jurisdiction to Determine the Lawfulness of Joint Rates to Official Territory Destinations and Combination Rates to Carolina Destinations Under Section 3(1) of the Statute 55
4. The Commission Lacked Jurisdiction to Determine The Reasonableness of the Assailed Combination Rates for Any Purpose 62
5. The District Court Did Not Hold That Prior Statutory Interpretations Relating To International Traffic "Necessitated" The Setting Aside And Annulling of The Commission's Orders 67
6. The Commission Does Not Have Jurisdiction Under The Statute To Consider The Lawfulness Of The Canadian Factor Of The Assailed 69

CONCLUSION 75

CERTIFICATE OF SERVICE 76

APPENDIX A:

Statutes Involved 77

APPENDIX B:

The Legislative History of the Jurisdictional Provisions of Section 1 of the Interstate Commerce Act 79

PAGE

APPENDIX C:

A Digest of cases in which the Commission declined to take jurisdiction over the foreign factor of combination rates made over "border points" within the United States 89

APPENDIX D:

A digest of joint rate cases in which the Commission declined to take jurisdiction over foreign railroads and the transportation they performed on traffic interchanged with American railroads at border points within the United States 96

TABLE OF CASES CITED

Alabama Great Southern R. R. Co. v. United States, 340 U. S. 216 22

Alabama Grocery Co, v. Atchison, T. & S. F. Ry. Co., 197 I.C.C. 728; affirmed 206 I.C.C. 559 53

Beumont, S. L. & W. Ry. Co. v. United States, 282 U. S. 74 22

Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I.C.C. 588 .... 15, 27

Brewster v. Gage, 280 U. S. 327 29

Carey Mfg. Co. v. G.T.W. Ry. Co., 36 I.C.C. 203 56

Consolidated Mining & S. Co. of Canada v. N.Y.C R. Co., 299 I.C.C. 231 .... 39, 40, 57

Crelinsten, M. & Sons v. Railway Express Agency, Inc., 201 I.C.C. 284 .... 50, 51

Cyanamid and Cyanide From Niagara Falls, 155 I.C.C. 207, 155 I.C.C. 488 .... 12, 15, 27, 40, 57

Fawcus Machine Co. v. United States, 282 U. S. 375 29

Florida v. United States, 282 U. S. 194 22

PAGE

Great Northern Ry. v. Sullivan, 294 U. S. 458 . . 44, 45, 46, 63, 64, 66

Houston E. & W. T. R. Co. v. United States, 243 U. S. 342 (1914) 56

Int. Com. Comm. v. Louis. & Nash. R. R., 227 U. S. 88 23

Interstate Commerce Comm. v. New York, N. H. & H. R. Co., 287 U. S. 178 29

Lewis-Simas-Jones Co. v. S. P. Co., 283 U. S. 654 . . 13, 14, 25, 29, 34, 43, 44, 48, 58, 63

Logan v. Davis, 233 U. S. 613 29

Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., 269 U. S. 217 . . . . 63, 64

Mayo Shell Corp. v. Baltimore & Ohio R. R., 297 I.C.C. 133 . . . . 35, 36, 39, 40

News Syndicate Co. v. N.Y.C. R. R., 275 U. S. 179 . . . . 13, 14, 16, 31, 43, 44, 58, 63, 65, 71, 72

New York Cent. R. Co. v. United States, D. C. Mass., 99 F. Supp. 394 22

New York, N. H. & H. R. Co. v. Interstate Commerce Comm., 200 U. S. 361 29

Publication of Rates between United States and Canada, 147 I.C.C. 778 30

Seatrain Lines, Inc. v. United States of America and Interstate Commerce Commission, 168 F. Supp. 819 . . . . 22, 23

Spanish River Pulp & Paper Mills v. A. & W. Ry. Co., 113 I.C.C. 343; 120 I.C.C. 251 27

Stevens Grocer Co. v. St. L., I. M. & S. Ry. Co., 42 I.C.C. 396 64

St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation District, 304 U. S. 295 61

Through Routes and Through Rates, 12 I.C.C. 163 . . 70

PAGE

United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499 22

U. S. v. Chicago North Shore R. Co., 288 U. S. 1 29

United States v. Great Northern R. Co., 343 U. S. 562 .... 59, 64

U. S. v. Pennsylvania R. Co., 323 U. S. 612 .... 25, 29

United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515 22

United States Overseas Airlines, Inc. v. P-R S. Lines, 309 I.C.C. 411 52

Yellow Jacket Boat Co., Inc. v. Atchison, T. & S. F. Ry. Co., 302 I.C.C. 657; 305 I.C.C. 113 .... 32, 44, 45, 47, 62, 65

Thompson v. United States, 343 U. S. 549 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 257

H. K. PORTER COMPANY, INC., *et al.*,

Appellants,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,

Appellees

No. 258

INTERSTATE COMMERCE COMMISSION,

Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,

Appellees

No. 266

UNITED STATES,

Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF VERMONT

BRIEF FOR THE CENTRAL VERMONT RAILWAY, INC., *ET AL.*

Statutes Involved

Sections 1(1)(a) and (2), 1(5) and 3(1) of the Interstate Commerce Act, Part I, 49 U.S.C. § 1(1)(a) and (2), 1(5) and 3(1), which are set forth in *Appendix A* hereof.

Questions Presented

I.

Does the Interstate Commerce Act give the Interstate Commerce Commission jurisdiction over *combination rates* legally applicable on *international traffic*, moving from origins within Canada to destinations within the United States, and over the *Canadian* and *American* railroads maintaining those rates where:

1. single line proportional rates are published solely by and for the account of the individual originating *Canadian* lines for application from the Canadian origins to United States ports of entry adjacent to the international border, and under such a rate the individual *Canadian* railroad performing the transportation within Canada carries the freight across the international boundary to a border point within the United States for the sole purpose of interchanging it with an *American* connecting line railroad; and

2. where *local rates* are published solely by and for the account of *American* railroads to apply only to that portion of the transportation performed by them from the interchange border points within the United States to destinations within the United States;

or

under such facts and circumstances does the Interstate Commerce Act give the Interstate Commerce Commission jurisdiction only over the *local rates* published solely by and for the account of the *American* lines for application only to that portion of the transportation which they perform from the border points within the United States to destinations within the United States?

II.

If the Interstate Commerce Act gives the Interstate Commerce Commission limited jurisdiction over *combination rates* legally applicable on *international* traffic moving from origins within Canada to destinations within the United States, and over the *Canadian* and *American* railroads maintaining those rates, under the facts and circumstances stated in Question No. 1, are not the ultimate findings and the order of the Commission nevertheless invalid, and has not the Commission abused its administrative discretion?

Statement of the Case

The Central Vermont Railway, Inc., and numerous other American railroads,* operating within the United States, and the Quebec Central Railway Company and the Canadian National Railways,** operating within Canada, participate in the movement of international shipments of crude asbestos and asbestos fiber from producing points in Quebec, Canada, to consuming points in North and South Carolina. The *Canadian* railroads transport the traffic from the origins in Quebec to border points within the United States, where it is interchanged with *American* railroads for transportation to the Carolina destinations.

There are no *joint rates* published for application on the traffic. It moves under *combinations of rates* made up of single line proportional rates published by and for the account of individual *Canadian* railroads for application from the Canadian points of origin to border points within the United States, and *local rates* published solely by and for the account of *American* railroads for application only to that portion of the transportation which they themselves perform from the interchange border points within the United States, at which the traffic is received from Canadian connecting line railroads, to destinations within the United States.

---

* Sometimes hereinafter referred to simply as *American* railroads.

** Sometimes hereinafter referred to simply as *Canadian* railroads.

Five complaints were filed with the Interstate Commerce Commission against the Canadian and American railroads, each of which assailed the applicable *combination rates,* alleging them to be unjust and unreasonable, and unduly preferential and prejudicial, in violation of Sections 1 and 3, respectively, of the Interstate Commerce Act. Not one of these complaints assails the lawfulness of the *local rates* published solely by and for the account of American railroads for application only on that portion of the transportation which they themselves perform from the interchange border points within the United States to destinations within the United States. The prayer of each complaint asked the Commission to require the defendant railroads to establish just and reasonable rates for future application on such shipments, and to award reparation on past shipments. Because the assailed rates were *combination rates* and not *joint rates,* the railroad appellees from the very beginning of the litigation before the Interstate Commerce Commission took the position that (1) only the *American* factors applicable from the border points of interchange and the transportation performed under those factors are subject to the jurisdiction of the Commission, the lawfulness of which was not assailed in the complaints filed with the Commission, and (2) the complaints assailed rates not within the purview of the Interstate Commerce Act and were, therefore, beyond the jurisdiction of the Commission.

The Commission rejected the jurisdictional contentions of the appellees (r. 72-73) on the ground that the United States ports of entry, over which the applicable *combination rates* were made and where the Canadian and American railroads interchange this traffic, are three or five miles south of the international boundary, and that the rates published by the Canadian railroads "obligate those carriers to provide substantial transportation service within the United States".

The Commission found the assailed rates unjust and unreasonable "in so far as the transportation takes place within the United States" (r. 76-77). "In so far as the transportation takes place within the United States", it also found the rates assailed from the Quebec origins to the Carolina destinations unduly preferential and prejudicial to the extent that they exceeded *joint rates* applicable from same origins to other points in the United States by specified amounts (r. 77-78). It further found the complainants before the Commission had been damaged and were entitled to reparation (r. 78). It ordered (r. 80-81) the *Canadian* and *American* railroads, "according as they participate in the transportation within the United States", to maintain and apply rates, regulations, and practices which will prevent and avoid the undue prejudice and preference found to exist.

On March 12, 1959, the railroad appellees instituted an action in the United States District Court for the Southern District of Vermont (r. 1) seeking the convening of a three-judge statutory court and, after hearing, the entry of a decree permanently suspending, enjoining, setting aside and annulling the orders of the Interstate Commerce Commission. On March 7, 1960, that court submitted an opinion (r. 241-253) holding "that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate". It accordingly annulled and set aside the orders of the Commission, and remanded the cause for further proceedings in conformity with its opinion.

The complainants before the Commission, the Commission, and the United States are here appealing from the judgment of the District Court.

Summary of Argument

I.

Five complaints were filed with the Interstate Commerce Commission, each of which assailed the applicable *combination rates*, alleging them to be unjust and unreasonable and unduly prejudicial, in violation of Sections 1 and 3, respectively, of the Interstate Commerce Act. None of the complaints assailed the lawfulness of *local rates* published solely by the *American* railroads for application solely on that portion of the transportation which they themselves perform from interchange "border points within the United States" to Carolina destinations. The complaints asked the Commission to require the defendant railroads to establish just and reasonable rates for future application on such shipments, and to award reparation on past shipments.

Section 1(1)(a) of the Interstate Commerce Act expressly provides that the provisions of Part I thereof shall apply to *common carriers* engaged in transportation of passengers or property wholly by rail from or to any place in the United States to or from a foreign country, *but only in so far as such transportation takes place within the United States*. Section 1(2) of the statute also expressly provides that the provisions of Part I shall apply to such *transportation* of passengers or property, *but only in so far as such transportation takes place within the United States*.

The appellees contend that the jurisdictional limitations appearing in the statute apply equally whether the Commission is dealing with violations alleged under Section 3(1) or under Section 1(5).

In the face of the statutory limitation on the scope and authority of the Commission, it has long since been firmly established by the Commission and the courts that *American* railroads have a clear alternative with respect to the manner of publishing rates to apply on *international* traffic. They may elect to publish rates applicable only to that portion of the transportation which they themselves perform, in which event they are answerable only for the lawfulness of those rates, or they may participate with *foreign* carriers in the publication and maintenance of *joint rates* applicable to the entire transportation, in which event they become jointly and severally liable for any unlawfulness found in those rates.

For more than 40 years the Commission itself has held in effect that its jurisdiction over international traffic attaches at United States ports of entry within the United States on or adjacent to the international border. Throughout that entire period where such traffic moved on *combination rates* made up of foreign and domestic factors applicable to or from the ports of entry or interchange points on or adjacent to the international border, the Commission itself has treated such ports of entry or interchange points, whether they were one-half mile or twenty miles from the international boundary, as being "for all practical purposes international border points". In all such instances, with the single exception of the instant proceedings,* the Commission has consistently refused to take jurisdiction over the foreign factor applicable to or from the border point within the United States, over the foreign railroad by whom and for whose account the rate was published, or over the service performed by that carrier under such a rate within the United States between such interchange "border points within the United States" and the international boundary.

In the instant proceeding, *combination rates* apply on asbestos shipped from Quebec mines to Carolina destinations. The rates were and are made up of a *Canadian* factor, published from Canadian origins to East Alburgh and Newport, Vt., United States ports of entry located three and five miles, respectively, south of the international boundary, and *American* factors published by the *American* railroads for application from those interchange border points to the Carolina destinations. The appellees have contended, and continue to contend, that by electing not to join in the establishment of *joint rates*, but by publishing *local rates* in lieu thereof applicable from the United States ports of entry or interchange border points reached by their Canadian railroad connections, "which for all practical purposes are international border points", the *American* railroads had in fact adopted the first of the two alternatives open to them, and thereby made themselves liable only for the lawfulness of the rates published by them. The Commission rejected that contention, stating that the rates maintained by the *Canadian lines* to the ports of entry within the United States "obligate them to provide substantial transportation service within the United States". It accordingly took jurisdiction over the assailed *combination rates* and made findings that those rates were unjust and unreasonable, in violation of Section 1, and prejudicial, in violation of Section 3(1), of the statute.

---

* And the possible exception of *Watab Paper Co.* v. *Canadian National R. Co.*, 152 I.C.C. 265, discussed by the District Court (r. 250).

Upon complaint by the railroads, the District Court held that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate". The appellees are in complete accord with that holding and advance it as their principal argument before this Court.

II.

Even if the statute may be said to give the Commission limited jurisdiction over the assailed *combination rates* the ultimate findings and order of the Commission are nevertheless invalid, and the Commission must be held to have abused its administrative discretion.

None of the complaints assailed only the factor of the applicable combination rate published solely by and for the account of the American railroads for application on that portion of the transportation performed by them within the United States. The consequent failure and inability of the Commission to inquire into and determine whether or not either the *local rates* of the *American* railroads or those rates plus the portion of the *Canadian factors* said to cover transportation performed by the *Canadian* carriers within the United States over which the Commission might have technical jurisdiction in and of itself invalidates the ultimate findings made by the Commission in its report of May 7, 1958.

Each of these findings is qualified by the words "in so far as transportation took or takes place within the United States"; but the report of the Commission gives no indication of the measure of the *combination rates* assailed in so far as the transportation thereunder took or takes place within the United States, and the record before the Commission contains no evidence whatever with respect thereto. In short, what the Commission did was to insert statutory language in its findings in a simple but ineffectual effort to convey the impression that it had remained within the confines of the statutory limits on its jurisdiction. The ultimate findings which the Commission made are thus invalid for the reason that they lack the necessary basic findings and evidence to support them.

The resulting order of the Commission is invalid for the reasons (1) that the findings are invalid in view of the absence of a basic finding as to the portion of the assailed rates applying to the transportation within the United States, the absence of evidence to support such a basic finding, and the absence of any complaint raising that precise issue; and (2) that it requires and directs both the *United States* and *Canadian* railroad defendants to establish, maintain, and apply for the future rates to cover the through transportation from Quebec origins to points in the United States despite the pronouncements by t s Court that the Commission may not regulate rates applicable on international traffic.

Finally, appellees contend that the abrupt departure by the Commission from a principle of more than forty years standing, only to resort to the application of that principle again six months later in another case, constitutes an abuse of discretion which renders its findings and orders herein invalid. It is appellees' contention that where, as here, the carriers have for all these years relied upon the Commission's construction of the statute and established and maintained their rates accordingly, the overturning of such settled administrative construction should be accomplished by the Commission, assuming cogent reasons exist, by resort to the rule making procedures provided for in the Interstate Commerce Act and the Administrative Procedure Act. It is their contention that the failure to resort to such procedures constitutes an abuse of discretion, which has been aggravated in the instant case by making its departure from principle retroactive through an award of reparation. That abuse of discretion has been further aggravated by the Commission's failure and refusal to give any cogent reasons for the extreme and abrupt departure from settled principle and by its reversion to that principle six months later in another case.

ARGUMENT

I.

The assailed rates are not within the purview of the Interstate Commerce Act, and are beyond the jurisdiction of the Interstate Commerce Commission.

The question which this Court is here called upon to determine is much simpler than the briefs of the appellants suggest.

Section 1(1)(a) of the statute expressly makes the provisions of Part I of that statute applicable to common carriers engaged in the transportation of passengers or property by railroad "from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States". Section 1(2) of that statute provides that "the provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, * * *". A legislative history of these jurisdictional provisions of the statute is set forth in *Appendix B* hereof for the convenience of the Court.

Under the statute the Commission either had jurisdiction to accept the several complaints filed with it and dispose of them on their merits, or it did not.

As the report of the Commission emphasizes (r. 72), and as the District Court pointed out (r. 245), it is firmly established that *American* rail carriers have a clear alternative with respect to the manner of publishing rates applicable to *international* traffic. They may publish rates to or from the international border applicable only to that portion of the transportation which they themselves perform, in which event they are answerable only for the lawfulness of those rates, or they may join with foreign carriers and publish *joint rates* for the entire transportation, thereby assuming joint and several liability for any unlawfulness in such rates. If the appellees are correct in their contention that each of the complaints was defective on its face, and that the Commission was without jurisdiction to consider them because the *American* railroads publish and maintain rates which conform to the first of the two alternatives open to them, the judgment of the District Court (r. 253) that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate," must be affirmed. The District Court held in effect that the Commission lacked jurisdiction of the subject matter of the complaints filed with it. Therefore, contrary to the allegations of the appellants, the Court was not required to do more, since any purported exercise of Commission jurisdiction under Sections 1 and 3 was void as a matter of law.

Long before the report of the Commission in the instant proceedings, as the Commission itself and the District Court both recognized (r. 72, 245), it was well settled law that *American* railroads have a clear alternative when participating in the transportation of international traffic. They may publish rates applicable to and from the border,[*] in which event they are answerable only for the lawfulness of the *American* factors, or they may participate in *joint* international rates, in which event they become jointly and severally liable for any unlawfulness found in those rates.

There were and are no *joint rates* published for application on the international traffic here involved. *Combination rates*, made over East Alburgh and Newport, Vt., the United States ports of entry adjacent to the international border through which this traffic moves and "which for all practical purposes are international border points",[**] applied and continue to apply on this traffic.

If the rates assailed in the complaints filed by the Commission were *joint rates*, there would be no question as to the limited jurisdiction of the Commission to entertain and deal with them to determine whether or not a cease and desist order should properly be entered or whether or not the complainants had been damaged by the maintenance of such rates. *Cyanamid and Cyanide from Niagara Falls,*

---

[*] Thereby making border point *combination rates* applicable on international traffic.

[**] The quoted language appears in *Hoffman-Taft, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I.C.C. 710, 712.

151 I.C.C. 207, 155 I.C.C. 488; *Lewis-Simas-Jones Co.* v. *S. P. Co.*, 283 U. S. 654. Even in such instances the Commission is without jurisdiction to *regulate* rates. But they were not *joint rates.* In this instance the American railroads elected not to participate in *joint rates.* Instead they published rates for application from the United States ports of entry, "which for all practical purposes are international border points", to the involved destinations, and none of the complaints assails the lawfulness of those *local rates.* That election, the appellees respectfully submit, conformed to the first of the two alternatives available to *American* railroads participating in the transportation of international traffic, and automatically limited the jurisdiction of the Commission to a consideration, in proper proceedings, of the lawfulness of the *American* factors. The Commission rejected that contention on the ground that East Alburgh and Newport, Vt., are three and five miles, respectively, south of the international boundary, and the rates maintained by the Canadian lines to those points "obligate those carriers to provide substantial transportation service within the United States".

The Commission is a creature of the statute and its powers are derived solely therefrom. Admittedly, the provisions of the statute give the Commission authority over common carriers by railroad engaged in the transportation of property, and over the transportation of that property, insofar as such transportation takes place within the United States. The appellees respectfully submit that the law with respect to the limitation of the Commission's power is still clear, having been dealt with particularly in two decisions of this Court, both written by the late Mr. Justice Butler.

The first of these cases was *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179. It was a reparation case only and involved *joint* international rates. It did not involve rates for the future. The question there was whether or not the Commission had jurisdiction on a complaint made against United States railroads alone to determine t reasonableness of a joint rate applicable from an orig in Canada to a destination in the United States. This Cou there held that the Interstate Commerce Act applied t the lines that carried and to the transportation of t traffic from the international border to the destinati there involved; that it was the duty of the United State railroads to establish just and reasonable rates for th service, which they had failed to do; that their failure t do so contravened the provisions of the Act and compelle the complainant before the Commission to pay the throug charges complained of; and that the Commission had jurisdiction to determine whether the complainant was entitled to an award of damages, and, in the ascertainmen of damages, jurisdiction to determine the reasonablenes of the charges exacted. Since the Court held that th breach of the carriers' statutory duty to do so was th proximate cause of the complainant's injury, it seems fairly certain that this Court would have ruled exactl to the contrary had the United States railroads publishe and maintained rates applicable from the internationa border in that case.

The second case was *Lewis, etc. Co.* v. *Southern Pac Co.*, 283 U. S. 654. It also was a case involving reparation only, in which a *joint* international rate was assailed as being unreasonable. The United States railroads had published and maintained a rate on the involved traffic from the international border to a destination within the United States, although that rate was not applicable on the international traffic involved in that proceeding. The defendant railroad contended (p. 659) that the Commission had not found that rate unjust, unreasonable or otherwise unlawful, and that the Commission had no jurisdiction to order the defendant to pay any reparation or damages. This Court held (p. 659), as it had in the *News Syndicate* case, that the Commission had jurisdiction to determine the reasonableness of the *joint* international rate which actually applied on the traffic involved in that case. However, this Court there held that the Interstate Commerce Act does not empower the Commission to prescribe or regulate *joint* international rates, but that it applies to international commerce only insofar as the transportation takes place within the United States. It held that the Act applied to the transportation of the traffic there involved from the boundary to destination, and required the defendant to establish just and reasonable rates for that service, rendering the defendant liable for damages resulting from its failure to do so. The Court stated (pp. 661-662) that "*while the Act does not govern the joint through international rate,* the demand for reparation is grounded upon the claim that the maintenance of that rate participated in by the *American* carrier and its violation of the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate". (Italics added).

The Commission itself has repeatedly cited either or both of those cases for the proposition that the United States railroads have a clear alternative of either publishing rates to and from the international border, in which event they are answerable only for the lawfulness of those rates, or of participating in *joint* rates, in which event they become jointly and severally liable for the lawfulness of those *joint* rates.

The legal principle regarding the making of rates on international traffic was first enunciated in *Black Horse Tobacco Company* v. *I.C. R.R. Co.,* 17 I.C.C. 588, decided February 17, 1910. It was restated and reaffirmed in *Cyanamid and Cyanide From Niagara Falls,* 155 I.C.C. 488, 490, as follows:

> "The interstate commerce act, from which we derive our powers, by its terms is applicable to transportation 'from or to any place in the United States to or from a

> foreign country,' and to common carriers engaged in such transportation, 'but only in so far as such transportation takes place within the United States.' Manifestly our jurisdiction must be so limited, for Congress could not confer upon us jurisdiction in respect of transportation wholly within a foreign country."

and then, after referring to the decision of the Supreme Court in *News Syndicate Co.* v. *N.Y.C. R.R.*, 275 U. S. 179, the Commission continued (pp. 491-492) as follows:

> "If the duty of the United States carriers to publish rates to and from the international boundary, referred to by the court, is exclusive and all embracing, then it must follow that participation in a joint international rate is *ipso facto* unlawful. We do not so construe the law. Moreover, such construction would not square with the statement of the court that 'Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error.' It is impossible to conceive of a 'just and reasonable' rate as the product of a tortious act.
>
> "We adhere to the view first expressed in *Black Horse Tobacco Co.* v. *I.C. R.R. Co.*, 17 I.C.C. 588, that the United States lines have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates. Or, they may become parties to *joint rates covering the entire transportation,* in which event they become jointly and severally liable for any unlawfulness in such rates. We have jurisdiction over the United States carriers. We have jurisdiction over a portion of the transportation. If in such circumstances the United States carriers enter into a *joint* undertaking *and participate in a rate which is an entity,* in respect of such transportation, we entertain no doubt that our control over them empowers us to require them

to cease and desist from participating in an existing *joint* rate, or to find their participation in a proposed joint rate not justified, if we find such rates are or will be unreasonable or otherwise unlawful. The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. But proof should not be confused with responsibility.

"There is a further and compelling reason why we should not surrender the jurisdiction we have heretofore exercised in respect of the participation of United States carriers in *joint* international rates. That jurisdiction has become established as the result of a long line of decisions. In *Black Horse Tobacco Co. v. I.C. R.R. Co.*, supra, decided February 17, 1910, the first case in which we considered the legal responsibility of United States carriers in respect of *joint* international rates, we said:

> 'Clearly, we have no authority to establish a rate of transportation in Mexico; nor to order the maintenance of a rate for the future from a point in the United States to a point in Mexico; but we may require the American carriers to cease and desist from continuing to apply a *joint* through rate, or any rule, regulation or practice in connection with that *joint* through rate, and we may, where such rate has been voluntarily maintained, inquire whether it has been reasonable, and if found unreasonable, award damages in that behalf.'

"Pursuant to that decision we have on numerous occasions either declared our power to require or have actually entered orders requiring United States carriers to cease and desist from participation in international rates which we have found to be unlawful." (Italics added)

For more than forty years the Commission has held in effect that its jurisdiction over international traffic attaches at ports of entry or exit within the United States. Throughout that entire time, except in the single instance which is the cause of this litigation, where international traffic moved on *combination rates* made up of factors applicable to ports of entry or interchange points on or adjacent to the international border, the Commission has refused to construe the statute as conferring jurisdiction upon it over the transportation between the international border, on the one hand, and the ports of entry or exit or interchange points adjacent to the international border, on the other. It has consistently exercised jurisdiction in such cases only over that portion of the transportation covered by *the American factors of combination rates applicable wholly within the United States.* It has consistently refused to take jurisdiction over the *Canadian factor* even though that factor of the *combination rate* obligated the *Canadian* railroad to handle the traffic to or from the United States port of entry or exit. A digest of such cases is contained in *Appendix C* hereof. Even in *joint* rate situations the Commission has refused to take jurisdiction over Canadian railroads, and the transportation they performed, when those railroads interchanged the traffic at points within the United States adjacent to the international border. A digest of such cases is contained in *Appendix D* hereof.

Such has been the interpretation of the statute with respect to the matter of jurisdiction by the Commission itself, and for more than forty years the railroads have relied upon that construction and interpretation of the statute, as they had an absolute right to do. As the District Court said (r. 252), that consistent interpretation ought not to be set aside either by the courts or by the Commission without a strong showing to justify a departure therefrom.

In rejecting the jurisdictional contention advanced by the railroads, the Commission stated (r. 273) that the Act "applies to all common carriers by railroad to the extent that such transportation takes place within the United States", and (r. 275) that it has "jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication".

In annulling and setting aside the Commission orders, the District Court pointed out (r. 247) that the Commission made no finding that the *local rates* south of the interchange points were unreasonable or prejudicial, but nevertheless held that it had power to review the entire transportation charge because the interchange occurred within the United States, and quoted the stated position of the Commission in its decision (r. 248).

The Court thereupon observed that "although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada", pointing out that "unless the rate of the foreign carrier is left to regulation by the foreign country the phrase 'but only insofar as such transportation takes place within the United States' will be drained of all meaning", adding that "the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge".

The Court also observed (r. 249) that "if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating".

The Court further observed (r. 249) that "the Commission would appear to have been in error when, in its decision in the instant case, it stated that its prior holdings support its present position", citing cases. The Court added that "not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review the foreign factor of a combination international rate". It pointed out (r. 252) that "the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case", and stated that "this consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure".

Finally, the District Court observed (r. 252) that "the Commission argues that unless we accept its present interpretation there will be left an unregulated 'no-man's-land' between the international boundary and the interchange points", an argument the Court found unpersuasive.

This Court should hold that the *American* carriers, having elected not to join in the establishment of *joint rates* for application on the international traffic here involved and having published rates from *border points within the United States* applicable only to that portion of the transportation which they themselves performed, are responsible only for, and the jurisdiction of the Commission is limited to a consideration of, the lawfulness of those rates.

II.

Even if the statute gives the Interstate Commerce Commission limited jurisdiction, the ultimate findings and the order of the Commission are nevertheless invalid, and the Commission has abused its administrative discretion.

A. The Commission's Ultimate Findings Are Invalid.

The failure and inability of the Commission to inquire into and determine the portion of the *Canadian* rate factor applying to *the transportation within the United States* performed by the Canadian railroads over which the Commission might have technical jurisdiction in and of itself invalidates the ultimate findings made by the Commission in its report of May 7, 1958 (r. 61-78).

Each of the ultimate findings appearing in that Commission's report is qualified by the words "insofar as the transportation took or takes place within the United States" or "insofar as the transportation takes place within the United States." However, as the plaintiffs have alleged in their complaint (r. 1, 8) in the court below, the report of the Commission does not set forth the measure of the combination rates assailed insofar as transportation thereunder took or takes place within the United States. Nor does the record in the proceedings before the Commission contain any evidence showing the measure of the assailed combination rates applying to the portion of the transportation that takes place within the United States. As a matter of fact, none of the complaints in the proceedings before the Commission alleges that the assailed combination rates were and are unlawful only insofar as transportation thereunder took or takes place within the United States. Those allegations are admitted (paras. 8 and 9) in the answers interposed by the defendants and the intervening defendants (r. 230, 236-237).

All that the Commission did was to resort to the simple expedient of employing the statutory language in a perfunctory attempt to show that it had remained within the statutory limits of its jurisdiction.

In *Alabama Great Southern R.R. Co.* v. *United States* (1951), 340 U. S. 216, the Supreme Court pointed out that detailed findings of fact are not ordinarily required of the Commission, and that it is sufficient if the written report discloses the essential basis of the judgment. However, the court stated:

> "Of course Sec. 14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi jurisdictional' findings essential to the statutory validity of the order."

In *Seatrain Lines, Inc.* v. *United States of America and Interstate Commerce Commission*, 168 F. Sup. 819, a case decided December 22, 1958, by a three judge statutory court sitting in the Southern District of New York, a somewhat similar situation was presented. The Interstate Commerce Commission order there under attack merely contained conclusions or ultimate findings recited in the language of the statute. The court held (p. 826) that such findings are not enough in the absence of basic findings to support them, citing *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 533; *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 506, 510-511; *New York Cent. R. Co.* v. *United States*, D. C. Mass., 99 F. Supp. 394; *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86-87.

The language used in *Florida* v. *United States* (*supra*) is particularly apposite here:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently ad-

verted * * *, but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." (p. 215)

In the *Seatrain* case the Court also pointed out (p. 827) that Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 1003(b), requires that in a case of "rule-making" the agency shall incorporate in any rules adopted "a concise general statement of their basis and purpose." There, as here, the case involved was a "rule-making" case* and such "concise general statement" was required. The Commission's findings in the instant case do not state the basis of the ultimate findings of the unlawfulness of the assailed combination rates "insofar as the transportation took or takes place within the United States" in compliance with the Administrative Procedure Act.

Moreover, the Commission could not lawfully make any such basic finding unless it were supported by evidence, *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, wherein the Court stated:

> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing

---

* "Rule making" is defined in Section 2(c) as "agency process for the formulation, amendment, or repeal of a rule", and "Rule" is defined as "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing."

> testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officers, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercise of power." (p. 91)

This prohibition against the making of findings and issuance of orders without supporting evidence is expressed in the Administrative Procedure Act thusly:

> "* * * and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party *and as supported by and in accordance with the reliable, probative, and substantial evidence.*" (Section 7(c), 5 U.S.C., § 1006.)

These appellees respectfully submit that the ultimate findings of the Commission herein are invalid for the reason that they lack basic findings and evidence to support them.

They submit that the foregoing is a clear illustration that the technical and literal construction of Section 1 of the Act was resorted to by the Commission, not for the purpose of regulating the portion of the transportation performed by the Canadian railroads within the United States under the *Canadian* factor of the *combination rate*, but for the purpose of regulating the transportation performed by the Canadian lines within Canada. The prohibition against such regulation is expressed in Section 1(1)(a) and (2) of the statute, is fully and clearly recognized by the Commission itself in the long line of cases discussed in Appendices C and D of this brief dealing with both joint and combination rate situations, and is expressed in clear and concise language by the Supreme Court in *Lewis, Etc. Co.* v. *Southern Pac. Co.*, (*supra*), 283 U. S. 654, 659-660, and in *U. S.* v. *Pennsylvania R. Co.*, 323 U. S. 612, 620-621.

B. The Order of the Commission Is Invalid.

The order is invalid for the reasons (1) that the findings are invalid in view of the absence of a basic finding as to the portion of the assailed rates applying to the transportation within the United States, the absence of evidence to support such a basic finding, and the further absence of any complaint raising that precise issue; and (2) that it requires and directs both the *United States* and the *Canadian* railroad defendants to establish, maintain and apply for the future rates applying to transportation from points in Canada to points in the United States.

The first ordering paragraph of the order dated May 7, 1958 (r. 81), directs "the defendants named in the complaints, according as they participate in the transportation within the United States" to cease and desist "from practicing the undue prejudice and preference referred to in the preceding paragraph hereof". Thus the findings and order do not run against the American lines alone.

The cease and desist paragraph of the order does enjoin the Canadian lines, directly or indirectly to take action necessary to make effective the finding in the case. The fact of the matter is the *Canadian* carriers are ordered by this paragraph to take affirmative action with respect to the factor of the combination rate applying from the *Canadian* origins to the port of entry. The requirement is not limited to that infinitesimal portion of the transportation within the United States, just as the findings are not limited to that portion of the transportation within the United States.

If there is any doubt concerning the attempted regulation of rates applicable to the entire transportation, the second ordering paragraph removes that doubt. That paragraph reads:

> "*It is further ordered*, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish, on or before August 14, 1958, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference referred to in the first paragraph thereof."

The first paragraph recites the finding of undue preference and prejudice and refers to the report for the "extent" of the undue preference and prejudice. The "rates, regulations, and practices" which the defendants are required and directed to establish and maintain are, therefore, those set forth in the ultimate findings appearing in the report of May 7, 1958 (r. 76-78). Those findings are to the effect that the rates from the Canadian origins to the North and South Carolina destinations are and will be unduly prejudicial to complainants, and unduly preferential to the complainants' competitors in Official Territory, to the extent that the rates assailed exceed or may exceed the rates to Ambler, Pa., and destinations taking the same rates, by specified amounts.

The end result is that the *Canadian* and the *United States* defendants must either reduce the rates to the North and South Carolina destinations or increase the rates to

Official Territory destinations. In either case, the rates that are required to be established and maintained by the *Canadian* and *United States* railroad defendants are rates intended by the Commission to apply to the *entire transportation* from the origins in Canada to the destinations in the United States, and *not to any particluar portion thereof.*

There can be no question but that the order requiring the Canadian and United States defendants to establish, maintain and apply either lower rates on the traffic involved in the complaints before the Commission or higher rates on the traffic from the same Canadian origins to destinations in Official Territory, *in either case the rates covering the entire transportation,* is a flagrant disregard of the statutory restriction against regulation of transportation in a foreign country.

In *Spanish River Pulp & Paper Mills* v. *A. & W. Ry. Co.*, 113 I.C.C. 343; 120 I.C.C. 251, the Commission, recognizing the statutory prohibition against regulation of transportation within a foreign country, treated the situation there presented with extreme care by pointing out that:

> "This affirmance and the order we make effective, we may repeat, do not and can not affect, directly or indirectly, and we are not concerned with, the rates which the Canadian Pacific may elect to maintain, or which the Board of Railway Commissioners for Canada may approve or prescribe, for application to the transportation from Espanola to the Soo of either local or through traffic." (120 I.C.C. 251, 255).

In *Cyanamid and Cyanide From Niagara Falls, supra,* the entire Commission adhered to the view first expressed in *Black Horse Tobacco Co.* v. *I. C. R. R. Co., supra,* but not without some doubt as to the propriety thereof. It there held that:

> "We believe the better course is to continue, as we have in the past, to exercise jurisdiction over the

participation of United States lines in existing joint rates, or the propriety of such rates proposed as a substitute for existing rates. This will be our policy until we are compelled to abandon it by a decision of a court of competent jurisdiction on the direct question." (155 I.C.C. 488, 493).

The Commission has continued on that course, uninterrupted by any decision of a court of competent jurisdiction or by the legislature. However, the Commission has never attempted, as it has in the instant case, to extend its jurisdiction to the point of regulating not only *United States* carriers but *Canadian* carriers as well, and to the point of regulating not only transportation within the United States but within a *foreign* country as well. On the contrary, the Commission has consistently held that it lacks jurisdiction over *foreign* carriers even though those lines extended into the United States and carried the freight into the United States to ports of entry on or adjacent to the international boundary. Insofar as concerns *combination rates* made over ports of entry or exit on or adjacent to the international boundary, the Commission has uniformly held that it could consider only the *American* factor of the combination and has never before attempted to extend its jurisdiction to *Canadian* railroads, and to the *Canadian factor* that carried the freight to or from ports of entry in the United States adjacent to the international boundary.

The Commission's order herein is as novel as it is unlawful. It indicates that the Commission resorted to a technical and literal construction of Section 1(1)(a) and (2) of the statute, not for the purpose of regulating the portion of the transportation performed by the *Canadian* railroads within the United States under the *Canadian* factor of the *combination rate*, but for the purpose of regulating the *Canadian* railroads and the transportation that took and takes place *within Canada*. The appellees repeat that the restriction against such regulation is expressed in Section 1(1)(a) and (2) of the statute, has been clearly and fully recognized by the Commission itself in the long line of cases decided by it, and is expressed in clear and concise language by the Supreme Court of the United States in *Lewis, Etc., Co. v. Southern Pac. Co. (supra)*, 283 U. S. 654, 659-660, and in *U. S. v. Pennsylvania R. Co. (supra)*, 323 U. S. 612, 620-621.

C. The Commission Abused Its Discretion.

The plaintiffs firmly believe that for more than forty years the Commission has correctly construed and applied the jurisdictional provisions of Section 1(1)(a) and (2) of the statute with respect to *combination rates* on *international* traffic made over ports of entry or exit on or adjacent to the international border. They believe that this "settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons". *New York N. H. & H. R. Co. v. Interstate Commerce Comm.*, 200 U. S. 361, 401; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Interstate Commerce Comm.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178. Particularly is this so where, as here, the carriers have for all these years relied upon the Commission's construction of the statute and established and maintained their rates in this manner. *U. S.* v. *Chicago North Shore R. Co.*, 288 U. S. 1, 13-14.

However, there is an element of discretion involved in this case, not discretion to apply or not to apply an established construction, but the discretion the Commission may possess in the form and procedure to be applied in the administration of the statute.

For many years the carriers have so constructed their tariffs as to make their *combination rates* applicable from or to the ports of entry or exit on or adjacent to the international border. That is evident from the many Commission cases referred to herein. It has become a rule of action, a practice engaged in by the railroads serving the ports of entry or exit, and one which the shipping public has accepted. The situation is somewhat analogous to one where the Commission had established a regulation or practice within its jurisdiction which, having been in effect for some time, had become a rule of action which entered into the business dealings of the country. In that situation, no change in the regulation or practice could be made effective, except upon notice to all who would be affected thereby, and a right accorded them to be heard in the matter. The procedure to be followed in such instances is expressly set forth in the Administrative Procedure Act, which is designed to insure and protect the rights of interested persons against arbitrary action by administrative agencies, including the Interstate Commerce Commission.

Had the Commission resorted to the rule-making procedures of the Administrative Procedure Act to effectuate a change in the carriers' manner of publishing and maintaining *combination rates* on *international* traffic, all interested persons would have been given notice with a description of the subject and issues involved, and a statement of the terms or substance of the proposed rule. Sec. 4(a), Administrative Procedure Act (5 U. S. C., § 1103 (a)). They would have been afforded an opportunity to participate in the rule-making proceeding, and the Commission, after consideration of all relevant matter presented, would have been required to incorporate in any rules adopted "a concise general statement of their basis and purpose." Sec. 4(b), Administrative Procedure Act.

That procedure is not without precedent in a situation of the kind involved in the case at bar.

Publication of Rates between United States and Canada (1928), 147 I.C.C. 778, was instituted by the Commission on its own motion following the decision of the Supreme Court in the *News Syndicate* case. The procedure followed by the Commission was substantially the procedure provided for in the Administrative Procedure Act. The Commission presented certain questions which arose from a consideration of the *News Syndicate* case "as to the effect of that decision upon existing practices in the publication of rates between points in the United States and points in Canada." It instituted the proceeding "in order that the Commission may be fully advised in the matter" and "to accord all interested parties an opportunity to file printed briefs, to be supplemented by oral argument, with respect to the general subject matter, including the legal problems involved, as well as considerations affecting practical traffic applications." The report indicates that appearances were made on behalf of numerous shippers and associations, and by numerous railroads, who presented briefs and participated in the oral argument. It was concluded that nothing should be done which would result in bringing about a cancellation of *joint rates* then in force and applicable to the transportation of traffic from and to points in the United States to and from points in Canada and Mexico. The Commission arrived at this conclusion because it thought it would "best serve the interests of all concerned by doing so, under present circumstances and conditions."

The interpretation of the statute which affects the rate situation in the case at bar is of importance to many shippers and carriers not parties to the proceedings. Nevertheless, the Commission has now undertaken to interpret Section 1(1)(a) and (2), so as to give it jurisdiction in any case where the railroads publish rates to or from ports of entry or exit adjacent to the international boundary instead of to and from the exact boundary. It has gone even further and penalized the carriers by making its departure from principle retroactive through an award of reparation.

Appellees respectfully submit that the Commission has abused its discretion in the case at bar. It has aggravated that abuse by giving retroactive effect to its departure from principle through an award of reparation. It has further aggravated that abuse by reverting to that principle six months later in *Yellow Jacket Boat Co. Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 302 I.C.C. 657, 305 I.C.C. 143. It has still further aggravated it by failing and refusing to give any cogent reasons for the extreme and abrupt departure from the settled administrative construction of the statute.

III.

The contentions of the appellants are without merit.

The various grounds advanced by the appellants in support of their prayer that this Court reverse the judgment of the District Court are generally those which were presented to the District Court and found lacking in merit. Not one of the three appellants has yet undertaken to meet squarely the simple but basic and fundamental contention of the appellees, which is the crux of this litigation, namely, that East Alburgh and Newport, Vt., the United States ports of entry, where the *Canadian* carriers interchanged the freight with their *American* railroad connections, although a few miles from the actual boundary line, "for all practical purposes are international border points", or as the District Court described them "border points within the United States." The election by the American lines to publish and maintain rates from those ports of entry and interchange border points, instead of joining in the establishment of *joint rates* to apply to the entire transportation, made them responsible only for the lawfulness of the domestic factors of the assailed *combination rates*, and automatically limited the jurisdiction of the Commission to a consideration of the lawfulness of those factors, to the transportation performed under those domestic rates, and over the American carriers performing that transportation.

A. The Contention of the United States.

The United States argues that the Commission had jurisdiction to enter an order requiring termination of the undue prejudice it found to exist. It argues (p. 8) that without regard for the correctness of the determination by the District Court that the Commission does not have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from points of origin to a border interchange within the United States, the Commission nevertheless acted within its jurisdiction in issuing a Section 3 order against railroads "operating in the United States". The United States argues in effect (p. 9) that the Commission's jurisdiction over the *Canadian* factor of the assailed *combination rates* may be relevant to the validity of the Commission's finding that the through *combination rates* were unreasonable, but that "insofar as the district court ruled on the validity of this finding, its ruling does not directly or indirectly affect the validity of the Commission's undue preference order". It argues that the finding that the through *combination rates* were unreasonable, and the related finding that the Carolina manufacturers are entitled to reparation, were not in issue before the District Court. This contention is an obvious attempt to circumvent the limits on the jurisdiction of the Commission fixed by Section 1(1)(a) and (2) of the statute.

However, even assuming *arguendo* that the United States is correct in its contention (p. 8) that lack of jurisdiction as to Section 1 does not apply to the Section 3 finding, it should be pointed out that the Commission awarded reparation under its Section 1 finding, not under a Section 3 finding. The record before the Commission would not support a reparation award under Section 3, since it does not contain the proof of special damage essential to support an award of reparation under Section 3.

The perfectly obvious answer to the arguments of the United States is that they beg the basic question. The

Commission either had jurisdiction to accept the several complaints filed with it and to dispose of them on their individual merits, or it did not. If, as the appellees contend, each of the complaints filed with the Commission was defective on its face, and assailed rates not within the purview of the Interstate Commerce Act, from which it would follow that the Commission lacked jurisdiction to entertain them, any question concerning the authority conferred upon the Commission by the provisions of Sections 1 and 3 of the Act, is entirely beside the point, and any orders issued under the purported authority of those sections, are automatically rendered null and void. On the other hand, if each of the several complaints was not defective on its face, and the Commission did not lack jurisdiction to dispose of them on their merits, the Commission admittedly would be acting wholly within its statutory authority in making appropriate Section 1 or Section 3 findings in these proceedings and issuing orders based on those findings.

However, the complainants before the Commission assailed *international* rates without limitation or restriction and sought the prescription of *international* rates without limitation or restriction. The statute does not give the Commission jurisdiction to prescribe or regulate such rates. *Lewis-Simas, supra.*

The argument advanced by the United States evinces a complete failure on its part to comprehend the difference between *joint rates,* on the one hand, and *combination rates,* on the other, in the case of *international* traffic. The argument also indicates a failure on the part of the United States to understand that the holding of the District Court is a jurisdictional one under Section 1(1) and (2), which necessarily embraces issues arising not only under Section 1(5) of the statute, but under Section 3(1) as well, inasmuch as the provisions of Section 1(1) and (2) are expressly made applicable to Part I in its entirety. If the publication of rates by the *American* railroads to apply from the United States ports of entry where the Canadian railroads interchange the traffic with the American railroads, "which for all practical purposes are international border points", constituted the adoption of one of the two clear alternatives open to *American* railroads, the Commission obviously had no authority to entertain complaints assailing international *combination rates* made over those border points, or to enter any order, whether it purported to be one issued under authority of Section 1(5) or 3(1). Stated another way, before the Commission can deal with a rate situation involving alleged prejudice and preference it must have jurisdiction over the rates alleged to be prejudicial under the provisions of Section 1(1) and (2) of the statute, and for any finding or order of the Commission to be lawful it must hurdle the jurisdictional barrier set up in the statute.*

The United States cites (p. 17) *Mayo Shell Corp.* v. *Baltimore & Ohio R.R.*, 297 I.C.C. 133, and contends that the Commission there ruled, in accordance with the view which it had declared in *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, that it is empowered to act against undue prejudice caused by disparate rates for through transportation furnished in part outside the

---

* The Commission apparently agrees with the appellees' contention in that respect, as it admits in its brief (p. 10) that "the rail carriers operating within the United States could not be held responsible for the unlawfulness of the combination rates if, in fact, such rates applied to and from the international boundary". That admission by the Commission points up the basic issue decided by the Court below and which is here on appeal, namely, whether the publication of local rates by the *American* railroads from border points within the United States to apply only to that portion of the transportation performed by them satisfies the requirement that they publish and maintain lawful rates to or from the border, thereby making them responsible for the lawfulness of those rates only and limiting the jurisdiction of the Commission to a consideration of the lawfulness of those rates, as the Commission itself has consistently held since 1916, except in the single case of the instant proceedings.

United States. No support for such a broad and unqualified statement is to be found in the report in the *Mayo* case.

That report indicates (p. 133) that the rates to the Canadian destinations assailed in that proceeding were ***combination rates*** made up of factors applicable to and from "the Canadian border". The record in that proceeding shows that "the Canadian border" points were Detroit, Mich., Buffalo and Rouses Point, N. Y., each of which actually was a "border point within the United States" where the traffic was interchanged with *Canadian* carriers. After noting (p. 135) that portions of the transportation under the assailed rates occurred in Canada, and that several of the defendants were Canadian lines, the Commission held that it had jurisdiction "only over such of the transportation as takes place within the United States", and stated that its order would be "directed only against the defendant railroads engaged in such transportation". The Commission failed to take jurisdiction over the rate factors to the *Canadian* destinations, applicable from Detroit, Buffalo, and Rouses Point, the "Canadian border" points within the United States where the *American* railroads interchanged the traffic with the Canadian railroads; over the *transportation* from those "border points within the United States" to the international boundary; or over the *Canadian* railroads who performed that transportation. Although not so specifically stated in the report of the Commission in that proceeding, it seems clear that in the case of the international traffic involved therein the prejudice found to exist was in the American rate factors alone.

Since the Commission in the *Mayo* case regarded Detroit, Buffalo, and Rouses Point as "for all practical purposes international border points" and refused to take jurisdiction over the *Canadian* factors applicable beyond, but in the instant case expressly refused to regard East Alburgh and Newport, Vt., similarly, and insisted upon taking jurisdiction over the Canadian factors applicable to these border points within the United States, it is clear that the *Mayo* case not only does not support the contentions advanced by the United States, but on the contrary lends considerable support and authority to the contentions of the appellees.

Before the Commission can make a valid Section 3 finding or issue a valid Section 3 order, it must have jurisdiction over the rates assailed as being prejudicial in violation of Section 3 of the Act. The appellees respectfully submit that the argument of the United States is wholly without merit because of its complete failure to recognize that simple fact.

B. The Arguments of the Interstate Commerce Commission.

In support of its appeal from the judgment of the lower court, the Interstate Commerce Commission argues (1) that the Commission had jurisdiction to determine the preference and prejudice issue raised by the several complaints filed with the Commission, and (2) that the District Court erred in holding the Commission lacks jurisdiction to determine under Section 1 that a combination rate on through traffic from Canadian origins to destinations in the southern states was unjust and unreasonable "insofar as the transportation took or takes place within the United States".

1. *The Jurisdiction of the Commission Under Section 3(1).*

The argument advanced by the Interstate Commerce Commission, that under Section 3(1) of the statute the Commission possesses jurisdiction to determine the preference and prejudice issue raised by the several complaints filed with it, is substantially the same as that advanced by the United States, to which reply has hereinbefore been made.

The Commission begins its argument (p. 13) with the contention that "the District Court completely overlooked the fact that the order of the Commission entered May 7, 1958, was an order promulgated under Section 3(1) of the Act" and "treated the matter as one arising solely under the provisions of Section 1 of the Act". Any such argument can hardly be advanced seriously.

The complaint filed in the District Court sets forth (r. 10) the grounds on which it was made, including, among others, the fact that the order of May 7, 1958, exceeded the statutory power of the Commission, is based upon errors of law, is not supported by evidence or adequate findings, and is unlawful, arbitrary, null and void, for the reasons therein set forth. The order of May 7, 1958, which the District Court annulled and set aside, was a Section 3(1) order. Although holding that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor", the Court actually held in effect that the Commission lacked jurisdiction over the subject matter of the complaints filed with it. That being the case, the District Court was required to do nothing more, since any purported exercise of Commission jurisdiction under Section 1 or Section 3 would be void as a matter of law.

Incidentally the report of the Commission made no distinction concerning its jurisdiction under Section 1(5) of the statute versus its jurisdiction under Section 3(1). The lower court made no distinction with respect to the jurisdiction of the Commission under those sections of the statute. Neither does the statute itself make any such distinction.

The arguments advanced by the Commission concerning the power allegedly conferred upon it by Section 3(1) of the statute are wholly beside the point, because they, like those of the United States, ignore the basic question concerning the jurisdiction conferred upon or withheld from the Commission under the express provisions of Section 1(1)(a) and (2) of the statute under the facts of the instant case.

The authority of the Commission under Section 3 to deal with situations of alleged undue preference and prejudice is clear, and the various arguments advanced by the Commission as authority for its power to deal with such situations are probably correct where the rates assailed as being prejudicial, in violation of Section 3 of the Act, are clearly subject to the jurisdiction of the Commission. But before the Commission can undertake to determine whether particular rates violate the provisions of Section 3(1), it must have jurisdiction under the statute over the rates assailed as being prejudicial. If the Commission lacked jurisdiction to consider the complaints filed with it, it had no more authority to deal with an alleged Section 3 violation of the statute than it had to deal with an alleged Section 1 violation. The Commission has authority to eliminate alleged undue preference and prejudice only when the rates assailed as prejudicial, and the transportation provided thereunder, are made subject to its jurisdiction by the express provisions of the statute.

The Commission, like the United States, cites the *Mayo* case in support of its contentions with respect to the jurisdiction of the Commission under Section 3(1) of the statute. That case has hereinbefore been discussed (p. 19); and no further comment with respect thereto is here necessary.

The Commission also cites *Consolidated Mining & S. Co. of Canada* v. *N.Y.C. R. Co.*, 299 I.C.C. 231, and argues that case supports its Section 3(1) jurisdictional contentions.

As that report notes (p. 233), the rates assailed in that proceeding were two-factor combination rates. The first factor applied from Tadanac, B. C., to Chicago, Ill., over the lines of the Canadian Pacific Railway, and the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, crossing the international border at Portal, N. D. The second factor applied from Chicago, Ill., over the lines of *American* railroads to eastern destinations in the United States. Since the *combination rates* assailed in that proceeding were made over Chicago, Ill., and not over an international border point, there was not and could not have been any question as to the jurisdiction of the Commission to determine the lawfulness of the assailed combination rates. As a matter of fact, the first factor of the assailed *combination rate* was a *joint* international rate, as were the rates involved in the *Cyanamid*, *News Syndicate*, and *Lewis-Simas* cases, *supra.* In the *Consolidated Mining* case the Commission concluded that the prejudice and disadvantage there found to exist was caused entirely by the American railroads operating east of Chicago.

It is clear, therefore, that the *Consolidated Mining* case, like the *Mayo* case, not only does not support the jurisdictional contentions advanced by the Commission, but on the contrary lends additional support to the contentions of the appellees.

Finally, there is clearly no substance to the contention of the Commission (p. 21) that the failure of the lower court to sustain the Commission's orders would frustrate the "great purposes of Section 3(1)". The only effect of the decision of the District Court is to require complaints, in instances such as those here under review, to assail the *local rates* published by the American railroads and applicable to or from border points. In such instances, if the *American* factors assailed are shown to be unjust, unreasonable, unduly preferential or prejudicial, or otherwise unlawful, the Commission clearly has both the jurisdiction and the power necessary to deal with such situations, just as it has the jurisdiction and authority necessary to deal with conventional complaints which assail interstate rates applicable wholly within the United States.

2. *The Jurisdiction of the Commission Under Section 1.*

The answer to the argument advanced by the Commission (p. 22) that the District Court was in error in holding that the Commission lacks jurisdiction to determine under Section 1 of the statute that a *combination rate* on through traffic from Canadian origins to destinations in the United States was unjust and unreasonable "insofar as the transportation took or takes place within the United States", is substantially similar to the answer to its contention as to the alleged authority of the Commission under Section 3(1) of the statute. Unless by the express terms of the statute the Commission has jurisdiction over rates assailed in complaints filed with it, the Commission is without power to deal with a rate situation alleged to be unjust and unreasonable, in violation of Section 1(5) of the statute.

Contrary to the contention and apparent belief of the Commission (p. 24), the appellees' challenge was not directed to an "order based upon Section 3(1)" simply as such. It was directed to an order issued in proceedings instituted by complaints, each of which the appellees alleged was defective on its face and purported to assail rates which the Commission lacked jurisdiction to consider under the express provisions of the statute. The contention that a Section 3 issue is properly reviewable by a three-judge court, while a reparation order is properly reviewable by a one-judge court is wholly beside the point. The argument seems to suggest that issues arising in proceedings of this kind should be made the subject of piecemeal litigation. The appellees' reply to any such contention is that the basic or fundamental issue which this Court is asked to determine has to do with the jurisdiction and authority of the Commission to enter any order in these proceedings. The appellees contend that the jurisdiction of the Commission is the same for the purpose of determining issues raised under Section 1(5) as it is for determining issues raised under Section 3(1), and that any other issue is necessarily subordinate. The basic jurisdictional issue is paramount, and is as controlling with respect to the reparation aspect of the Commission's decision as it is to the prejudice aspect thereof.

In its argument dealing with the alleged merits, the Commission states (p. 25) that it had before it complaints which placed in issue "the lawfulness of the entire combination through rate", both factors of which were filed with the Commission and made applicable on the involved traffic. It points out (p. 26) that the receivers sought the prescription of lawful rates for the future, as well as reparation on past shipments.

But none of those facts conferred jurisdiction on the Commission. Only the statute can confer jurisdiction.

Neither does it avail the Commission anything to cite a rule of law (p. 26) established by the Commission as long ago as 1916, to the effect that "when a complaint involves charges applicable to a through shipment, the through rate or charge must be brought in issue and the participating carriers must be made defendants", and that "when the through rate or charge is made up of separately established rates or charges, applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof."

The Commission may very well require the observance of that rule in the ordinary case where all of the rate factors, the transportation performed thereunder, and the common carriers performing the transportation are clearly subject to its jurisdiction. But where, as here, the basic issue goes to the fundamental question of whether the Commission had jurisdiction to entertain the complaints filed with it and to deal with the rates assailed therein, the arguments advanced in support of the Commission's position are wholly beside the point. Certainly, where the basic question goes to the very jurisdiction of the Commission, the cases cited by the Commission can hardly be said to be in point.

The Commission even errs in implying (p. 28) that in complaints involving charges on through *international* shipments through rates must be put in issue. The *News Syndicate* and the *Lewis-Simas* cases, *supra*, there cited, have heretofore been discussed and nothing more need now be said, except to point out that the Commission is in error in its apparent contention that the judgment of the District Court is in conflict with the decision of this Court in the *Lewis-Simas* case, *supra*. In that case a *joint rate* actually applied on the international traffic there involved, and the late Mr. Justice Butler, speaking for this Court, merely held in effect that the subterfuge of publishing a domestic rate for application from the border to an interior point in the United States, but which was not in fact made applicable on the international traffic, did not operate to deprive the Commission of jurisdiction to determine the reasonableness of the *joint rate* which actually applied on the international traffic for the purpose of fixing damages.

Unlike the situation in the *Lewis-Simas* case, or the *News Syndicate* case, *joint rates* were not published for application on the entire international movement here involved. The applicable rates were *combination rates* made over United States ports of entry, "which for all practical purposes were international border points", which the District Court concluded were "border points within the United States".

The Commission nevertheless contends that "to the extent that this Court in the *Lewis-Simas* case, *supra*, held the rail carriers to the applicable rate on the through shipment, it is the controlling precedent here", arguing, in tongue-in-cheek fashion, that no rate of any kind was applicable from the international boundary, and that the appellees actually collected charges based on *combination rates* "made over interior points within the United States."

The Commission argues (p. 28) that the rule requiring that the through rate be put in issue where a complaint involves charges on through shipments has been uniformly applied to *international* traffic, citing as authority for that statement the *News Syndicate, Lewis-Simas* cases, *supra,* and *Great Northern Ry.* v. *Sullivan,* 294 U. S. 458. But none of these cases may be cited as authority for the statement that such a rule has been uniformly applied to *international* traffic. On the contrary, the Commission's recent decision in *Yellow Jacket Boat Co. Inc.* v. *Atchison, T. & S. F. Ry. Co.,* 295 I.C.C. 113, is proof that such is not the rule with respect to international traffic. That case will be discussed in greater detail hereafter.

The *News Syndicate* case was a reparation case only. The issue there was not whether "the through rate be put in issue"; the "through rate" in that case was a *joint rate,* and the issue was whether or not the Commission had jurisdiction to determine the reasonableness of a *joint rate* applicable from a Canadian origin to a United States destination on a complaint made against United States railroads alone.

The *Lewis-Simas* case was also one involving reparation only. There again the legally applicable rate was a *joint rate,* and there again this Court held, as it had in the *News Syndicate* case, that the Commission had jurisdiction to determine the reasonableness of the *joint* international rate, regardless of the concurrent existence of a rate published to apply from the international border to the United States destination but which was not in fact legally applicable on the international traffic.

The *Sullivan* case was likewise one which involved reparation only. In that case the issue was (p. 459) "whether the uncontroverted facts and those found by the Commission are sufficient to warrant the conclusion that he sustained damage in consequence of violation of the Act by defendant". In that case this Court, again speaking through the late Mr. Justice Butler, concluded that "the charges collected were not excessive, and confessedly the same amounts lawfully might have been collected without injury or damage to plaintiff if only the connecting carriers had imposed the charges by means of 'joint' instead of the 'combination' through rates that they did establish". Treating the applicable proportional rates as divisions of a *joint* rate, this Court held that "retention by the defendants of an undue proportion of just and reasonable charges did not damage plaintiff". Commenting on the alleged support which the Commission claimed might be found in the *Sullivan* case, the District Court stated that "a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction but rather with the consignee's proof of injury".

But the Commission can hardly point to the *Sullivan* case as a pillar of strength which supports its present contentions if for no other reason than the fact that in *Yellow Jacket Boat Co., Inc.* v. *Atchison, Topeka & S. F. Ry. Co.*, 305 I.C.C. 113, decided October 30, 1958, almost six months after its decision in the instant proceedings, the Commission undertook to interpret and distinguish the *Sullivan* case.

In that proceeding the Commission was called upon to determine the lawfulness of rates on boat shapes originating at Mahone Bay, Nova Scotia, Canada, destined to Denison, Texas. The rates charged for the entire transportation reflected a triple combination of rates, made up of a factor applicable wholly within Canada from Mahone Bay, Nova Scotia, to Windsor, Ontario, a rate from Windsor, Ontario, to Detroit, Michigan, and a rate from Detroit to Denison, Texas, but the attack was directed against the domestic rate only:

After pointing out that the defendants in that case relied principally on the *Sullivan* case, the Commission said:

> "In the exercise of our authority to award damages, we require that the total rate or charge within our jurisdiction be shown to exceed a reasonable maximum. Thus, in the report on reconsideration in *United States v. Beaumont, S.L. & W. Ry. Co.*, 301 I.C.C. 231, cited by the defendants, we found a combination rate not shown to have been unreasonable where only one factor was attacked, even though the parties had stipulated that the remaining factor was reasonable. While that action was based on the authority of the *Great Northern* case, the assailed rates were completely within our jurisdiction, the movement being entirely domestic.
>
> "With respect to the measurement of damages on international traffic, the distinction between proportional and joint rates, on the one hand, and, on the other, local rates to and from the border, is crucial. Clearly, we have no concern with a rate published to apply on a movement wholly within Canada. As observed in *Albee Fruit Co. v. Atlantic Coast Line R. Co.*, 293 I.C.C. 785, 787:
>
>> 'The jurisdiction of this Commission over international traffic is limited to such transportation only insofar as it takes place in the United States. We have no jurisdiction over that portion of the transportation from the international boundary to Montreal. It is well settled that railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable only for those rates, or they may participate in *joint* through rates and become jointly and severally liable for any unlawfulness found in such rates * * *. The rates here

> assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points.'
>
> "Domestic carriers have a statutory duty to establish just and reasonable rates to and from the international boundaries, or to participate in just and reasonable *joint* through rates. They are liable for damages sustained in consequence of their failure in that respect, *but where the complaint is against a joint through rate or a proportional rate to or from the border, there can be no recovery unless the proof is directed to the through service. This is not true, however, on international traffic where the rate in issue is a local rate so published to or from the border. A local rate is complete in itself and is not dependent for its application upon a movement to or from the border,* and in that respect differs from a proportional rate which is in nature of a division of a joint through rate. *Thus, where, as here, shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary.*" (pp. 116-117) (Italics added)

It thereupon found the assailed rates "from the border points at or near the international boundary" unjust and unreasonable. Difficult as it may be to believe in the light of the Commission's position in these proceedings, the fact is that in the *Yellow Jacket* case, decided less than six months later, the Commission took the very position with respect to its jurisdiction that the appellees have contended for from the very inception of the proceedings before the Commission in the case at bar.

Neither does it avail the Commission anything to argue (pp. 28-29) that in restricting itself to the question of whether the Commission has jurisdiction "over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange point within the United States", the District Court misconceived the rate situation before the Commission. Nothing could be clearer from the opinion of the District Court than the fact that it did not misconceive the rate situation before the Commission. It understood the rate situation perfectly, and in effect held that ports of entry, "which for all practical purposes are international border points", were in fact "border points within the United States" from which the American railroads had in fact published and maintained rates applicable to Carolina desinations. It follows that for the reasons already stated, the Commission's attempted statement of the facts and holding of the *Lewis-Simas* case are in error.

Contrary to the contention of the Commission (pp. 34-35), the fact that the Commission cases there referred to involved "*joint rates* over which the Commission's jurisdiction is conceded" was not "completely beside the point", nor was the District Court "simply confusing the the secondary question of *liability* for the establishment and maintenance of unlawful rates, with the primary issue of *jurisdiction* over transportation". It may or may not be material whether one or more than one carrier "participates in the transportation of the through traffic from origins in Canada across the international boundary to the rate break-interchange point *within the United States*", but what is material beyond any question is the issue raised by these appellees, namely, whether or not the Commission obtained jurisdiction when this international traffic was carried by rail across the boundary to a "border point within the United States" by a *Canadian* carrier under a rate published solely by and for the account of that *Canadian* carrier and solely for the purpose of interchanging the traffic with an *American* railroad.

In this instance the *American* railroads elected not to join in the publication and maintenance of a *joint international rate*, an alternative open to them under established law. In an attempt to circumvent the statutory limitation of its jurisdiction in such a case, the Commission is here attempting to convert a *combination rate* situation into an artificial *joint rate* situation by arguing that the action of the *Canadian* lines, in publishing rates solely for their own account to apply to United States ports of entry on or adjacent to the international boundary, not only made themselves but their *American* railroad connections responsible for the lawfulness of the resulting border point *combination rates*. The *American* lines had no voice or control in fixing the measure or manner of publishing those rates, which are applicable almost wholly within Canada. They accordingly here chose to publish only *local rates*, based on their conviction that under the law they thereby made themselves responsible only for the lawfulness of the rates which they themselves published for application to the transportation which they themselves performed within the United States.

This Court should not permit the Commission to deprive the appellee *American* railroads of their lawful right to protect themselves in instances of this kind by electing not to join in the establishment of *joint international rates*, but in lieu thereof to establish rates for their own account to apply from "border points within the United States" to cover only that portion of the transportation which they themselves perform within the United States, in accordance with the consistent statutory construction made by the Commission itself for more than forty years.

To argue (p. 36) that any inconsistency in its decision in these proceedings with other decisions by the Commission does not constitute a basis for upsetting this order of the Commission is to resort to any argument which comes to mind, however frivolous it may be, in a panicky attempt to justify something impossible of justification. Jurisdiction under the statute presents a question of law, not a question of fact, and it is not for the Commission to construe the statute in one manner on one occasion and, based on that construction, assert that it lacks jurisdiction, and then on another occasion, under similar or substantially similar facts or circumstances, construe the statute in another manner and, based on that construction, assert and exercise jurisdiction, as its whims and fancies of a particular moment may dictate. The Commission either has jurisdiction under a given set of facts and circumstances, or it does not.

In *Crelinsten, M. & Sons* v. *Railway Express Agency, Inc.* (1934), 201 I.C.C. 284, the lawfulness of *joint rates* on strawberries from Florida origins to Quebec destinations, was assailed, the United States ports of exit involved in that proceeding being "Rouses Point, N. Y., or Highgate Springs, Vt., points a few miles south of the international boundary". The Commission regarded the transportation from Florida to Rouses Point, N. Y., or *Highgate Springs, Vt.*, as all of the transportation taking place within the United States, observing that "practically all of the transportation north of Rouses Point and Highgate Springs was in Canada", and stating that "we have no jurisdiction over that portion of the transportation from the international boundary to Montreal". Actually, *the distance from Highgate Springs, Vt., to the international boundary was 3.5 miles*, or a half mile greater than the distance from the international boundary to *East Alburgh, Vt.*, one of the United States ports of entry involved in the instant proceedings. The Commission treated *Highgate Springs, Vt.*, "for all practical purposes", as the actual international boundary. Moreover, it undertook to ascertain what the measure of the assailed rate was for that portion of the transportation which took place within the United States, something it failed to do in the instant proceedings. Although the assailed rate in the *Crelinsten* case was a *joint rate*, the Commission ascertained that if it had been published as a *combination rate*, the factor applicable from Florida origins to *Highgate Springs, Vt.*, would have been "approximately $4.13". In that case the Commission did not assert jurisdiction over the *Canadian* "factor" of $1.05, which was assumed to represent the measure of the *joint rate* applicable from *Highgate Springs, Vt.*, to Montreal, P. Q., or over the *Canadian* lines, for whose account the $1.05 "factor" was reflected in the movement from *Highgate Springs, Vt.*, to Montreal, P. Q. In that case the Commission tacitly concluded that the *Canadian* "factor" included in the *joint rate* did not obligate the *Canadian* lines "to perform substantial service within the United States". The Commission has still made not the slightest attempt to explain what "substantial transportation service within the United States" the Canadian National Railways was obligated to perform from the international boundary to *East Alburgh, Vt.*, a distance of three miles (r. 73), that the *Canadian* line in the *Crelinsten* case was not likewise obligated to provide within the United States from Highgate Springs, Vt., to the international boundary, a distance of 3.5 miles. Such wholly inconsistent and inequitable administration by the Commission of the statute creating it and granting it power is error as a matter of law.

Contrary to the contention of the Commission (p. 38), the issue presented to this Court is not whether the Commission possessed jurisdiction *under Section 1(4) of the statute* to determine the lawfulness of the assailed *combination* through rates, but whether *under the provisions of Section 1(1)(a) and (2) of the statute* the Commission had jurisdiction to entertain the several complaints filed with it and deal with them on their merits. Whether the

Commission had jurisdiction to determine the lawfulness of the assailed rates under the provisions of Section 1(4) depends upon the answer to the basic question.

Finally, the rather lengthy argument (pp. 39-44) that "liability attaches regardless of the method of rate publication" again begs the basic question of whether the Commission had jurisdiction over the *combination rates* assailed. The question of liability for the assessment of unlawful rates and charges cannot possibly be important before the determination of the basic question with respect to the jurisdiction of the Commission to find the rates assailed unjust, unreasonable or otherwise unlawful.

In any event, the true rule is set forth in detail in *United States Overseas Airlines, Inc. v. P-R S. Lines*, 309 I.C.C. 411, decided January 15, 1960, where the Commission said:

> "The complainant refers to the rule that if a through rate, either joint or combination, is found inapplicable or unreasonable and reparation is awarded, the order runs against the carriers collectively that participated in the transportation. *Alabama Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 197 I.C.C. 726, 727-8; affirmed, 206 I.C.C. 559, 561. *That rule has reference to shipments moving in this country, and not to international traffic moving on border-point combinations.* On *international* traffic the rule is that railroads in this country have a clear alternative with respect to their participation in such traffic. They may publish rates applicable to or from the border, in which event they are answerable only for those rates, or they may participate in joint through rates and become jointly and severally liable for any unlawfulness found in such rates. See *Albee Fruit Co. v. Atlantic Coast Line R. Co.*, 293 I.C.C. 785, 787."

The *Alabama Grocery* case there cited by the Commission is one of the cases cited by the Commission in a footnote (p. 42) of its brief.

The appellees respectfully submit that the Commission has advanced no argument or justification which this Court can accept as a basis for setting aside the judgment of the District Court.

C. The Arguments of the Intervenors.

The complainants before the Commission were granted leave by the District Court to intervene in support of the defendants. In the brief filed with this Court in their behalf they submit six arguments in support of their appeal from the judgment of the District Court, each of which will be separately replied to.

1. *The Interstate Commerce Act Does Apply From the International Border to the Interior Points in the United States.*

The appellees are in general agreement with the contention of these appellants that the statute applies from the international border to interior points in the United States. However, the basic question is what constitutes the border within the meaning of the statute, and automatically fixes the limits of the jurisdiction conferred upon the Commission by the express provisions of the statute. Stated another way, the basic question is whether United States ports of entry located a few miles from the actual international boundary, where traffic is interchanged between Canadian and American railroads, and which the Commission itself has characterized, as "for all practical purposes international border points" for more than forty years, and which the District Court concluded were "border points within the United States", are to be regarded and treated as border points within the meaning of the statute.

A directly related question is whether the publication of rates, by and solely for the account of *American* railroads, to or from such "border points within the United States", constitutes the establishment of rates to or from the international boundary, within the meaning of the statute, makes the *American* railroads responsible only for the lawfulness of those rates, and at the same time limits the jurisdiction of the Commission to a consideration of the lawfulness of those rates.

These appellants argue that the District Court was in error in holding that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate".

The appellees respectfully submit that the District Court was not in error; that the law is well established that one of the two alternatives available to *American* railroads in the transportation of *international* traffic is to publish rates to or from the international border to apply only to that portion of the transportation that they themselves perform; that for more than forty years the Commission itself has asserted that its jurisdiction attaches at United States ports of entry, interchange points, or border points on or adjacent to the international boundary; that the appellees relied on that construction of the statute by the administrative agency charged with administering it as they had a right to do; that as the District Court said "this consistent interpretation ought not to be set aside, eiher by the courts or by the Commission, without a strong showing to justify departure"; and that no such showing or justification has yet made or even attempted.

2. *There Has Been No Showing That the American Railroads Failed to Satisfy Their Statutory Duty to Establish Just and Reasonable Rates From the International Border.*

In what is essentially nothing more than a variation of the argument advanced in support of their first contention, these appellants argue that it was the statutory duty of the appellee railroads to establish just and reasonable rates from the international boundary to destinations in the United States. Here again the appellees agree with that general contention. However, these appellees insist that the *American* railroads did establish rates from the international border to interior destinations in the United States.

Accordingly their answer to this contention is substantially the same as their answer to the first contention, namely, that East Alburgh and Newport, Vt., were "for all practical purposes international border-points", as the Commission has consistently treated similar ports of entry, or interchange "border points within the United States" as the District Court characterized them, and that the publication and maintenance of rates from those border points within the United States to interior points within the United States, which have not been assailed or shown to have been or to be unjust, unreasonable or otherwise unlawful, fully satisfied and continues to satisfy the statutory duty of the appellees.

3. *The Commission Lacked Jurisdiction to Determine the Lawfulness of Joint Rates to Official Territory Destinations and Combination Rates to Carolina Destinations Under Section 3(1) of the Statute.*

The argument advanced in support of this point (pp. 24-35) in reality is largely a dissertation on the subject of preference and prejudice, and the principles applied in ordinary cases arising under Section 3. The appellees would be in substantial agreement with most of what is said if the application of those principles were being argued in proceedings in which there was no question as to the jurisdiction of the Commission to consider the alleged Section 3 violations. In the instant proceedings, however, they are principles completely unrelated to the basic issue before this Court. Therefore, this argument, like that of the United States and the Commission, appears to represent an attempt to circumvent the limits on the jurisdiction of the Commission expressly fixed by the provisions of Section 1(1)(a) and (2) of the statute.

The complaints filed with the Commission assailed *international* rates without limitation or restriction, and sought the prescription of *international* rates without limitation or restriction. As this Court held in *Lewis-Simas, supra*, the statute does not give the Commission jurisdiction to prescribe or *regulate* such rates. In *Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342, 356 (1914), a case cited by these appellants, this Court held that the language of Section 3 was sweeping enough to embrace all discriminations of the sort described. It qualified that statement, however, by limiting it to those discriminations "which it was within the power of Congress to condemn" and "which it had authority to reach".

Carey Mfg. Co. v. *G.T.W. Ry. Co.*, 36 I.C.C. 203, cited by the appellants (p. 25), is one of the cases which has been cited consistently by the appelles in support of, and as authority for their jurisdictional contentions. It was decided in 1915, and the rates there assailed were joint rates. As shown by the appellants (p. 25, footnote 14), the Commission took the position that its jurisdiction "attaches at the ports of entry", as these appellees have been contending from the very beginning of the litigation before the Commission. As that footnote makes clear, in that report the Commission said that "it could control the rates which the American lines charged from the 'ports of entry' in the United States to destinations in the United States, whether such rates were joint rates or separately established rates applicable to the through transportation". Again that is exactly what these appellees have been contending repeatedly throughout this entire litigation. And, except for the instant proceedings, the appellees are still unable to find a single report of the Commission, involving traffic moving under combination rates made over United States ports of entry or exit on or adjacent to the international border, where the Commission did not take the position that it had jurisdiction only over the *factor* applicable to that portion of the transportation performed wholly within the United States from or to the ports of entry or exit, over the transportation performed by the *American* railroads under those rates, and over the *American railroads* performing that transportation. Certainly that was not true in the *Cyanamid* and *Consolidated Mining* cases cited by the appellants (pp. 26-27). Thus, like the Commission, these appellants are wholly incorrect, if not misleading, when they represent to this Court (p. 27) that "in the past the Commission has exercised jurisdiction over international through rates, be they single factor rates or rates made on a combination basis".

Intentionally or otherwise, these appellants also misrepresent the fact when they state (p. 27) that "the single factor joint rates to Official territory were brought in issue as being violative of the Act". Each of the complaints filed with the Commission assailed *combination* rates legally applicable over the entire transportation from the interior Canadian origins to the Carolina destinations. Not one of them assailed the lawfulness of the *joint* rates applicable from those interior Canadian origins to destinations in Official territory and alleged them to be too high or too low, just as none of them alleged that the *American factors* applicable from border points within the United States were unlawful.

The appellants argue (p. 29) that "undue prejudice may be inflicted as effectively by a through rate made on a combination basis as by a joint rate", but it does not follow that the District Court was in error in pointing out that the rates which the Commission found unreasonable and prejudicial in the instant case were *combination* rates rather than *joint* rates, or that "such a distinction would be without legal significance since the Commission has power to remove unjust discrimination in both classes of cases".

On the contrary, whether the through rates here involved were *joint rates* or *combination rates made over international border points* is a fact of extremely important legal significance.

Had the *American* railroads joined in the establishment of *joint* rates, by the individual act of each participating carrier, American or Canadian defendant, they would have become jointly and severally liable thereby, and the Commission would have had jurisdiction to determine the nature and extent of the alleged unlawfulness, insofar as the transportation took place within the United States. By electing not to agree to the establishment of *joint* rates in this instance, but to publish and maintain rates to and from the United States ports of entry only, "which for all practical purposes are international border points", where the traffic was interchanged between the Canadian and American railroads, the latter made themselves answerable only for the lawfulness of those rates, and the jurisdiction of the Commission was limited to a consideration of those rates.

The legal significance was *in fact* the crucial point in *News-Syndicate Co.* v. *N.Y.C.R.R., supra,* and *Lewis, Etc. Co.* v. *Southern Pac. Co., supra,* in both of which the failure of the *American* carriers to publish rates from the international border constituted a violation of the provisions of the Act, and compelled the complainants before the Commission to pay the through charges complained of. The Court expressly held that the proximate cause of the losses complained of was the breach of that statutory duty to publish rates from the international boundary. Moreover, the distinction has been consistently recognized by the Commission as well in many cases involving *combination rates* made over ports of entry located on or adjacent to the international boundary, which are digested in *Appendix C*. And, of course, the distinction is reflected in the two alternatives which the Commission has consistently held the railroads possess in publishing rates for application on international traffic.

To argue (pp. 30-32) that through routes existed from the interior Canadian origins to the Carolina destinations, and that the appellees have held themselves out to render a through transportation service, and have handled cars of asbestos to the Carolinas under *combination rates*, lends no support to the basic argument here being advanced that the Commission had jurisdiction to determine the lawfulness of the single factor *joint* rates to Official territory destinations and the through rates made on a *combination* basis o rates. The existence of through routes is completely subordinate to the basic question of whether or not the appellees maintained rates which enabled the Commission to assume jurisdiction in these proceedings for any purpose, or whether by the maintenance of *local rates* to and from the border points within the United States, applicable only to the transportation performed by the *American* railroads, those railroads made themselves responsible only for the lawfulness of those rates, and automatically limited the jurisdiction of the Commission to a consideration of those rates in complaint proceedings in which the lawfulness of those rates was properly put in issue.

Moreover, in *United States* v. *Great Northern R. Co.*, 343 U. S. 562, this Court recognized the distinction as follows:

> "The Interstate Commerce Act contemplates the existence of through route in the absence of joint rates. And this court expressly has approved the

> Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates. As a result, *the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes.*" (pp. 572-573) (Italics added)

In a related footnote (p. 572) it added:

> "It is the duty of every carrier to establish reasonable through routes *but there is no corresponding duty to establish joint rates with other carriers.* 49 U. S. C. § 1(4). Joint rates may be established either by agreement of the carriers, 49 U.S.C. § 6(4), or by Commission order, 49 U.S.C. § 15(3)." (Italics added)

The appellants are in error in contending (p. 32) that it cannot be argued that the Commission was without jurisdiction to determine the issues under Section 3(1) of the statute because single factor joint rates were applicable to destinations in Official territory, whereas combination rates were applied to Carolina destinations, on the ground that in the case of the single factor joint rates an express agreement was involved, whereas in the case of combination rates such an express agreement was lacking. According to the appellants, in the case of the combination rates the agreement was implied.

All that the cases cited by the appellants (pp. 32-32) prove is that where a *joint rate* has not been published a *combination rate* becomes legally applicable, and that the participating carriers assert that the parts of the applicable combination rate are component parts of the through rate to be charged.

Finally, it is argued that the appellees' contention that the Commission lacked jurisdiction to order the alleged discrimination removed because *international rates* are ined and that the Commission is not empowered to regulate such rates, is unsound because (1) the Commission ordered the discrimination removed through the requirement that rates to the Carolina destinations should not exceed rates published and maintained to Ambler, Pa. "by more than designated amounts", which is "regulation of the amount of the differential which can exist" between the assailed and the compared rates, but "is not regulation of through rates from Canada to either Official territory destinations, such as Ambler, or to Carolina destinations, such as Charlotte"; and (2) freedom from regulation of through transportation charges from Canadian origins to destinations in the United States does not imply that the appellees can discriminate at will.

In support of these contentions the appellee cites (p. 34) *St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation District*, 304 U. S. 295, which obviously affords no support whatever for the contentions made under its alleged authority.

How the Commission could fix the amount of a differential to be observed by the railroads in connection with international rates applicable from interior origins in Canada to interior destinations within the United States without such action constituting the "regulation of through rates from Canada" to destinations within the United States is something the appellees simply cannot understand.

The reason the Commission had no authority in these proceedings to order the allegedly unlawful discrimination removed was because the *American* railroads elected not to join in the establishment of *joint* international rates for application on the involved traffic, but instead chose to publish *local* or *domestic* rates applicable from "border points within the United States" for application only to that portion of the transportation which they themselves performed, and thereby made themselves responsible for the lawfulness of those *local rates* only, and automatically limited the jurisdiction of the Commission accordingly.

4. The Commission Lacked Jurisdiction to Determine the Reasonableness of the Assailed Combination Rates for Any Purpose.

The contentions advanced in support of this argument are without authority or substance.

The argument begins with the wholly unsupported assertion that "upon proper complaint the jurisdiction of the Commission to determine the reasonableness of international through rates applicable over through routes under section 1(5) of the Act for the purpose of awarding damages as authorized by sections 8 and 16(1) of the Act is beyond question". The limitation on the Commission's jurisdiction in ~~that~~ respect is absolutely clear. The single exception to that limitation is the one which gives the Commission *limited* jurisdiction, where the assailed international rate is a *joint* rate, because the *American* railroads elected to join with foreign railroads in the establishment of *joint rates* instead of publishing *local* or *domestic rates* to or from the international border. In that case the Commission has jurisdiction over the *joint international rate* solely for the purpose of determining damages, or issuing a cease and desist order.

Neither did the complaints filed with the Commission, assailing the ~~through~~ transportation charges, alleging that they were unjust and unreasonable, and praying damages, conform to a fixed rule of the Commission and of this Court that, where damages are claimed, the through transportation charges must be assailed and found unreasonable. The applicable rule is to be found in the *Yellow Jacket* case, *supra*, decided by the Commission approximately six months after its decision in the instant proceedings, where it said "where * * * shipments originating at Canadian points beyond the border moved from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary”.

The appellants are also in error when they contend (p. 35) that the District Court refused to apply the principle enunciated in the *News Syndicate* case, *supra*, because the through rates were made on the combination basis. It argues that in the *Sullivan* case, *supra*, this Court held that the principle announced in the *News Syndicate* and *Lewis-Simas* cases, *supra*, controlled the disposition of a case which involved through rates made on a combination basis. It has heretofore been shown that the issue in the *Sullivan* case was “whether the uncontroverted facts and those found by the Commission are sufficient to warrant the conclusion that he sustained damage in consequence of violation of the Act by defendant”, and that this Court merely held that “retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff”. As the District Court observed (r. 252), “a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction, but rather with the consignee's proof of injury”.

The appellants point to the decision of this Court in *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, and the statement therein that “the shipper's only interest is that the joint rate be reasonable as a whole”. They contend (p. 38) that an argument that this basic principle is not applicable when a question of reparation is involved in connection with through *international* shipments would be without merit. The appellants have heretofore argued that the through rates involved in that case and the *Sullivan* case, *supra*, “were in fact joint through rates even though they were constructed on a so-called combination basis”.

The decision in the *Sloss-Sheffield* case indicates (p. 231) that the rates there involved were *joint rates*, while the decision in the *Sullivan* case indicated (p. 459) that the rates there involved were *combination rates.* This Court disposed of that contention in *U. S.* v. *Great Northern R. Co., supra,* wherein it held that the establishment of *joint rates* is an act separate and distinct under the statute from the establishment of through routes, and that, while it is the duty of every carrier to establish reasonable through routes, there is no corresponding duty to establish *joint rates* with other carriers.

These appellants, like the Commission itself, contend (p. 38) that in finding the through rates unjust and unreasonable and awarding damages, the Commission administered the statute according to a rule laid down in *Stevens Grocer Co.* v. *St. L., I. M. & S. Ry. Co.*, 42 I.C.C. 396. The reply made to that contention by the Commission applies equally here.

To argue (p. 41) that it is firmly established that the Commission's jurisdiction to award reparation is the same whether the shipments involved are domestic or *international* is to ignore the clear holdings of this Court and the Commission itself on that point. The Commission certainly has authority under the statute to award reparation on *domestic* traffic in a proper proceeding and upon a proper record. But the authority of the Commission to award reparation on *international traffic* is special and limited. It exists only where the *American* railroads have breached their statutory duty to maintain just and reasonable rates and charges to or from the international border. By virtue of that breach the Commission is given *limited* jurisdiction to determine the reasonableness of legally applicable *joint* rates and the damage occasioned by reason of the failure of the *American* railroads to publish and maintain just and reasonable rates to or from the international border. Moreover, the report of the Commission in the *Yellow Jacket* case, *supra*, one of the most recent decisions of the Commission in a case of this kind, completely denies the validity of this contention.

These appellants contend (p. 41) that an argument that their complaints to the Commission should have assailed only the *local* rates from East Alburgh and Newport, Vt., would be without merit because this Court and the Commission have consistently held that "insofar as reparation is concerned the through rate must be assailed and found unreasonable by the Commission before reparation can be awarded".

The *News Syndicate* case, *supra*, is cited as the case in which this Court so held. That case has hereinbefore been discussed in detail, and it is only necessary to point out here that nothing in that case may be said to be a holding by this Court that "the through rate must be assailed and found unreasonable by the Commission before reparation can be awarded".

In the case of the Commission, that contention is refuted by its decision in the *Yellow Jacket* case, *supra*. In that case the Commission specifically held (p. 117) that where "shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary". It there found that the assailed rates "from *the border points on or near the international boundary*"* were unreasonable and awarded reparation. This decision denies the contention of the appellants (p. 42) that had the complainants assailed only the local rates from East Alburgh and Newport, Vt., to the Carolina destinations, the Commission would not have had jurisdiction to determine and award damages, and neither the *News Syndicate* nor the

---

* Italics supplied.

Sullivan case there cited may properly be cited as authority for that contention. Moreover, contrary to the contention of these appellants, the District Court did not interpret the *Sullivan* case, *supra*, "as relating to proof of unreasonableness of the through rate rather than as a jurisdictional question". What the District Court said was (r. 252) that this Court "there was not dealing with the Commission's jurisdiction but rather with the consignee's proof of injury".

Finally, these appellants argue (p. 43) that the District Court's observation that "if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overchages that they had no part in formulating", makes it obvious that "the District Court has completely ignored the law of joint tort feasor liability as it relates to the question of damages". The appellants argue that it is just such participation by the carriers in the assessment of unjust and unreasonable through transportation charges, which makes them liable as joint tort feasors, citing several cases as authority for that contention. Obviously, the question of liability is completely subordinate to the basic issue of whether or not the Commission had jurisdiction and authority to find the assailed *combination rates*, including the *Canadian* factors, unreasonable. If the Commission lacked jurisdiction to find the assailed rates unjust and unreasonable, there could be no question as to damages.

The significance of the observation of the District Court, to which this argument is directed, concerned itself with a situation in which the foreign factor of an international *combination rate* might be unjust and unreasonable and found to be so, but under the principle of the decision of the Commission in the instant proceedings the *American* carriers would nevertheless be liable "for a portion of overcharges that they had no part in formulating."

The appellees respectfully submit that, contrary to the contention of these appellants, the Commission lacked jurisdiction to determine the reasonableness of the assailed *combination rates* for any purpose.

5. *The District Court Did Not Hold That Prior Statutory Interpretations Relating to International Traffic "Necessitated" the Setting Aside and Annulling of the Commission's Orders.*

The appellants argue (p. 44) that one of the reasons the District Court set aside and annulled the Commission's orders was that the Commission was "bound by previous decisions dealing with international adjustments". The District Court was not in error in its discussion and summary of the third observation contained in its decision (r. 249-252). It is the appellants themselves who are in error in the argument they make with respect to this particular point.

The District Court analyzed the factual situation very carefully. It pointed out (r. 247) that the rates which the Commission undertook to find unlawful were *combination rates,* that the *Canadian* carriers "operate within the United States only for the purpose of turning over" the traffic to *American* railroads, that the Commission had made no finding that the "local rates south of the interchange points published by the American railroads were unreasonable or prejudicial", but that the Commission nevertheless "held that it had power to review the entire transportation charge—from mines in Quebec to consignees in the Carolinas—because the interchange occurred within the United States".

The District Court set aside and annulled the Commission orders because it concluded (r. 253) that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United

States as will give the Commission jurisdiction over the foreign factor of the combination rate". In short, the District Court upheld the contentions of the appellees that the Commission was without jurisdiction to review the entire transportation charge from Quebec origins to Carolina destinations under the facts and circumstances established by the record before the Commission in these proceedings.

All that the Court was doing in that portion of its opinion which is here alleged to have been error was pointing out, not only that the cases cited by the Commission itself did not support its decision, but that, on the contrary, the Commission was in error when it stated that its prior holdings supported its report. The District Court pointed out that "the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case". The District Court did not say that because of its prior reports the Commission could not in this case make a contrary finding. What it did say was that "this consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure". No such showing had been made and, as a matter of fact, no such showing has been attempted even yet.

The appellants argue (p. 44) that the fact that "the District Court makes no distinction between the Commission's previous administration of the Act as it relates to discrimination or as it relates to damages", makes it necessary to deal with that alleged error from the standpoint of discrimination and damages separately. There is no substance or merit to that argument. The District Court concluded in effect that the Commission lacked jurisdiction to consider the entire transportation charge, and having decided that basic fact the District Court was required to do no more, since any purported exercise of jurisdiction by the Commission under Section 1(5) or Section 3(1) would be void as a matter of law.

In arguing that the courts are not concerned with the correctness or with the consistency or inconsistency of the Commission's decisions, these appellants, like the United States and the Commission, fail or refuse to recognize the vital distinction between *joint international rates* and *combination rates* made over international border points, and the decisive effect thereof on the jurisdiction of the Commission depending upon the nature of the rates assailed. Where something is as crucial as the fundamental question of jurisdiction, the Court must be concerned with the correctness of the Commission's interpretation and treatment of the jurisdictional provisions of the statute. As these appellees have consistently contended throughout this litigation, the Commission has jurisdiction in all instances of this kind, or it lacks jurisdiction in all instances of this kind. The determination of that basic jurisdictional question, of course, has application both from the standpoint of alleged discrimination and from the standpoint of damages.

6. *The Commission Does Not Have Jurisdiction Under the Statute to Consider the Lawfulness of the Canadian Factor of the Assailed Combination Rate.*

The appellants here argue (p. 48) in effect that the decision of the District Court was erroneous because it wrongfully turned on the issue of the Commission's jurisdiction over the rates maintained by the Canadian lines to East Alburgh and Newport, Vermont, the United States ports of entry and "border points within the United States" where the traffic is interchanged with *American* railroads. They argue that the District Court's statement of the issue presented for decision and the ultimate holding of that court reveal a totally erroneous approach.

This argument apparently rests on the ground that the District Court treated the *Canadian* factors of the assailed *combination rates* "as being independent units of charge for independent units of service", claiming that to be error and further arguing that the District Court "separates and divides a single unit of charge and single unit of service which are indivisible" citing as it previously did *Through Routes and Through Rates*, 12 I.C.C. 163. The lack of substance or merit in that argument is attributable to and explained by the failure or refusal of the appellants to understand the legal significance of through routes over which *joint rates* apply versus those over which *combination rates* apply. In both *Through Routes and Through Rates, supra,* and *Thompson* v. *United States*, 343 U. S. 549, referred to at pages 30, 31, of brief of these appellants, it was made clear that the applicable rates might be either *joint rates* made by the parties to the through routes or a combination of "separately established rates, fares and charges applied to the through transportation" fixed independently by the several carriers forming the "through route". However, as the appellees have previously pointed out, carriers joining in the establishment of through routes do not thereby obligate themselves to establish *joint rates* for application thereover. And still contrary to the contention of the appellants the jurisdiction of the Commission over the *Canadian* factors of the assailed *combination rates* is essential before the Commission can decide any issue purporting to be raised by the complaints relating to discrimination or damages.

The argument the appellants make (p. 52) with respect to the "jurisdiction of the Commission relating to award of damages" is largely a repetition with slight variations of arguments made earlier in the appellants' brief.

The appellants argue that the finding of this Court in the *Sullivan* case, *supra*, prohibits the dividing of a single unit of charge for a single unit of transportation service. It argues that to permit such a division would violate a rule that when damages are in issue the through transportation charge must be assailed and considered. The answer to that contention is that the principles established by the Commission itself make it clear that the appellants are here in error. That is made clear by the report of the

Commission in the *Yellow Jacket* case, *supra*, a portion of which has hereinbefore been quoted (pp. 41-42), and in the *United States Overseas Airlines* case, a portion of which has likewise hereinbefore been quoted (pp. 47-48).

As for the belated contention that if the appellee carriers were of the opinion that the proportional factors are responsible for any unreasonableness in the through rates, the burden was on them to come forward with proof to that effect". The obvious answer to that contention is that the burden of sustaining the allegations made in the several complaints was upon the complainants and never shifted. There never was any burden on the *American* appellees to prove that the Canadian factors were unreasonable: For either the appellants or the appellees to have attempted to prove that fact before the Interstate Commerce Commission would have been a futile thing, since the Canadian Board of Transport Commissioners would be the only administrative agency which might have jurisdiction to determine the lawfulness of the *Canadian* rate factors of the assailed *combination rates.*

Neither is there any more substance or merit to the argument advanced by the appellants (p. 53) concerning the alleged "jurisdiction of the Commission relating to rates for the future."

This argument rests on the continued contention of the appellants that the Canadian lines should have published "a rate for that part of the transportation service performed between the international boundary line and East Alburgh and Newport, Vermont, respectively." The obvious answer to that contention is that the transportation service referred to "is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate" as the District Court held. It is preposterous to argue that the failure of the *Canadian* line to do that is comparable to the failure of the *American* railroads involved in the *News Syndicate* case, *supra,* to have done so. There the railroad defendants were *American* railroads whom this Court said had breached their statutory duty to establish lawful rates for the portion of the transportation which they performed within the United States. Here, the Canadian railroads published single line rates solely for their own account to cover transportation performed by them almost entirely within Canada. Again, contrary to the contention of the appellants (p. 54) the distinction between the two factual situations is of controlling legal significance.

In an attempt to clothe the argument otherwise wholly lacking in substance or merit with some semblance of authority, the appellants here attempt to make much of the decision of this Court in the *News Syndicate* case, *supra*, where the limited jurisdiction which this Court there held the Commission had stemmed solely from the breach of the *American* defendant railroads of their statutory duty to establish and maintain lawful rates for application from the international boundary. The appellants point out that the ports of entry involved in that proceeding were Black Rock and Suspension Bridge, New York. The appellees point out that those points are "border points within the United States" and that what the appellants have overlooked is the fact that this Court treated those points as points which for all practical purposes are international border points, just as the appellees contend the Commission should have treated East Alburgh and Newport, Vermont, in the instant proceedings.

The appellants argue (p. 56) that the District Court missed the purpose for which the Commission cited certain of its cases there referred to, when it distinguished this case on the ground that they involved *joint rates* or practices relating thereto, whereas these proceedings involved *combination rates*. In support of that contention, however, the appellants are again content to say simply that "this was a distinction without legal significance", the question being where the Commission's jurisdiction attached.

The obvious answer to that contention is the one which has been given repeatedly heretofore. In the case of *joint international rates*, the Commission obtains limited jurisdiction to consider the entire rate solely because of a breach by *American* lines of their statutory duty to publish lawful rates applicable to or from the international border, and, if the *joint international rates* assailed are found unlawful, the limited jurisdiction thus obtained by the Commission only authorizes it to issue a cease and desist order, or to award reparation. In the case of *combination rates* made over international border points, the jurisdiction of the Commission is expressly fixed by the provisions of the statute, and authorizes the Commission to consider only the lawfulness of the factor published and maintained by the *American* railroads to cover transportation which they themselves perform within the United States.

The appellants argue (p. 59) that it cannot be contended that the "Canadian National Railway Company and the Quebec Central Railway Company are not subject to the jurisdiction of the Commission because they publish proportional rates from the Canadian origins to ports of entry three to five miles south of the international boundary line for the purpose of interchange".

If, as the appellees contend and the District Court held in effect, the Commission lacked jurisdiction over the foreign factor, it makes no difference whether the Canadian lines published those rates as single line proportional rates or as local rates. In any event, the obvious answer to that contention is that for over forty years the Commission itself has taken the very position which the appellants argue cannot be taken.

Finally, the appellants argue (p. 59) that under the statute the Commission has authority to require the Canadian lines to establish rates from the international boundary from East Alburgh and Newport, Vt., and to issue a cease and desist order prohibiting further participation by the appellee railroads in the through rates now being assessed, both to destinations in Official territory and to Carolina destinations, and to require the establishment of lawful rates from the international boundary. It argues that if the Commission does not have such power, it is impotent insofar as international rates are concerned, and the appellees are placed in a position to demand exorbitant rates in the form of through transportation charges, and to discriminate at will without intervention or hindrance from the Commission.

The obvious reply to that impotent argument is that if East Alburgh and Newport, Vt., may be considered as international border points within the meaning of the statute, each of the complaints filed with the Commission was defective on its face, and the Commission lacked jurisdiction to deal with it. On the other hand, if those points may not be considered and treated as the international border within the meaning of the statute, the contentions of these appellants with respect to the jurisdiction of the Commission would be correct in appropriate proceedings.

But even if the Commission lacks the jurisdiction claimed for it, it is preposterous to argue that the Commission is "impotent" insofar as international rates are concerned, and that the appellees are in a position to demand exorbitant rates without intervention or hindrance from the Commission. To the extent that the American appellees participate in *joint international rates*, they will be subject to the limited jurisdiction of the Commission just as they have been and presently are. To the extent that the *American* railroad appellees elect not to joint in *joint international rates* but to maintain *domestic rates* applicable only from or to the international border, the Commission will have jurisdiction over those rates, just as it heretofore had and presently has. In other words, the Commission will be no more or less "impotent" with respect to the regulation of international rates than it has been or presently is in all similar instances.

Conclusion

The appellees respectfully submit that the District Court was correct in holding that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate"; that none of the appellants has presented any reason which would require setting aside the judgment of the District Court; and that the judgment and order of the District Court should be affirmed.

Respectfully submitted,

J. Edgar McDonald,
466 Lexington Avenue,
New York 17, New York,
Attorney for Appellees.

Of Counsel:

J. Raymond Hoover,
Metropolitan Bank Bldg.,
Washington 5, D. C.

William H. Parsons, Esq.,
Warner Building,
13th and E Streets, N. W.,
Washington 4, D. C.

Horace H. Powers,
Railroad Terminal Building,
St. Albans, Vermont.

John F. Reilly,
750 Third Avenue,
New York 17, New York.

William F. Zearfaus,
Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Penna.

Certificate of Service

I, J. Edgar McDonald, attorney of record for the Central Vermont Railways, Inc., et al., appellees in these proceedings, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing brief on the several parties to this action, as follows:

1. On the appellants, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, by mailing copies in duly addressed envelopes to its attorneys of record, with air mail postage prepaid, E. B. Ussery, 608 Security Federal Building, Columbia 1, South Carolina, Harvey L. Golden, Security Federal Building, Columbia 1, South Carolina, and Joseph J. Lipton, Security Federal Building, Columbia 1, South Carolina.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the United States of America, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Archibald Cox, Solicitor General, W. Wallace Kirkpatrick, Acting Assistant Attorney General, and Charles H. Weston, Attorney.

This 17th day of March, 1961.

J. Edgar McDonald,
466 Lexington Avenue,
New York 17, N. Y.

APPENDIX A

Statutes Involved

Section 1(1) (a) and (2) (49 U. S. C. § 1(1)(a) and (2)).

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

* * *

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States,

* * *

Section 1(5) (49 U.S.C. § 1(5)).

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Appendix A.

Section 3(1) (49 U.S.C. § 3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

APPENDIX B

The Legislative History of the Jurisdictional Provisions of Section 1 of the Interstate Commerce Act*

As originally enacted by the Act to Regulate Commerce, February 4, 1887, 24 Stat. L. 379, Sec. 1 (effective April 5, 1887), the pertinent portions of Section 1 read as follows:

> "That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

---

* The United States Code, Title 49, Chapter 1, contains the Interstate Commerce Act, preserving the section numbers.

Appendix B:

The Hepburn Act, June 29, 1906, 34 Stat. L. 584, Sec. 1 (effective August 28, 1906), amended the above paragraph to read as follows:

> "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

Appendix B.

This paragraph was again amended by the Mann-Elkins Act, June 18, 1910, 36 Stat. L. 544, Sec. 7, effective August 17, 1910, to read as follows:

> "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent

> foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid."

The clause in this paragraph reading:

> "and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country"

was held by the Supreme Court in *Galveston* v. *Woodbury*, 254 U. S. 358, to be inapplicable to transportation to or from adjacent foreign countries. It is there stated at page 360:

> "There is a later clause in § 1 which deals specifically with the transportation of property to or from foreign countries; but cases arising under that clause are not applicable here. That clause applies where the foreign country is *not* adjacent to the United States."

The Court in the *Woodbury* case also decided the question as to whether the Act applied to transportation "from" an adjacent foreign country to a point in the United States, the doubt arising from the fact that Section 1 expressly declared that the Act applies to "any common carrier * * * engaged in the transportation of passengers or property * * * from any place in the United States to an adjacent foreign country", and made no like declaration with respect to common carriers engaged in transportation "from an adjacent foreign country to any place in the United States." The Court held:

> "A carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States. The test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation." (pp. 359-360)

Nevertheless, Congress on February 28, 1920, amended the aforesaid provisions of Section 1 (Section 400 of the Transportation Act, 1920, 41 Stat. L. 474) to read as follows:

> "(1) That the provisions of this Act shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> "(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
>
> "(c) The transmission of intelligence by wire or wireless; * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the

District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

"(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

"(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

"(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

"(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district."

When the Transportation Act of 1920 was under consideration in Congress, the Honorable Edgar E. Clark

Appendix F.

Member of the Interstate Commerce Commission, appeared before the Committee on Interstate and Foreign Commerce of the House of Representatives, 66th Congress, First Session, and stated in part as follows:

> "The second change in section 1 is found at lines 12 ~~and 13 on page~~ 2 of the bill which makes the terms of the act applicable also to traffic 'from an adjacent foreign country to any place in the United States'.
>
> "For some reason that traffic is omitted from the provisions of the present act. It is not our thought that that will confer upon the Commission, or carry the terms of the act as applicable to jurisdiction over rates from specific places in an adjacent foreign country to places in the United States. *It is a general provision that* puts that transportation under the provisions of this act and *makes entirely clear in the statute what we have uniformly held—that we had jurisdiction of that transportation in so far as it was performed within the confines of the United States,* and that if the carriers should persist in maintaining a joint through rate which we found to be unduly prejudicial or unjustly discriminatory, we had the power to require the carrier operating within the United States to withdraw its concurrence from that joint through rate and establish a reasonable proportional or other rate for the transportation from the boundary to destination in the United States." (Hearing on H.R. 4378, beginning with p. 10, July 15, 1919.)

In *U. S.* v. *Pennsylvania R. Co.*, 323 U. S. 612, the Court had the following to say with respect to the Transportation Act of 1920:

> "This Court has stated that the 1920 Act, containing this limiting clause, 'applies to international commerce only in so far as the transportation takes place

within the United States.' *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660. The question in that case was as to joint through railroad rates over a railroad route partly in the United States and partly in Mexico. The Court further said as to this situation that 'The Act does not empower the Commission to prescribe or regulate such rates."[9] In *St. Louis, B. & M. R. Co.* v. *Brownsville District*, 304 U. S. 295, this Court was called upon to consider whether, under the 1920 Act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that in the absence of a discrimination against shippers, places, or classes of traffic within the United States, American railroads were 'not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico.' *These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad, it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries.*" (pp. 620-621) (Italics supplied.)

These jurisdictional provisions were amended once more since 1920 but only to delete therefrom any reference to the transmission of intelligence by wire or wireless in paragraph 1 and in paragraph 2. This was accomplished on June 19, 1934, (48 Stat. L. 1102). Accordingly, paragraphs 1 and 2 of Section 1 now read and since June 19, 1934, have read as follows:

"[9] Notwithstanding this, however, the Court held that where such joint rates were voluntarily fixed and charged by an American railroad, the Commission could, under the power given it by the 1920 Act, pass upon the reasonableness of the joint international rate."

Appendix B.

"Sec. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

"(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this part except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district."

APPENDIX C

A Digest of cases in which the Commission declined to take jurisdiction over the foreign factor of combination rates made over "border points" within the United States.

Big Basin Lumber Co. v. S. P. Co. (1916), 37 I.C.C. 730, involved the lawfulness of rates on lumber from a point in Mexico to destinations in the United States, subject to a three-way combination rate made up a local rate to the Rio Grande River, a bridge charge, and an American factor applicable from El Paso. The Commission stated (p. 737) that it was "without power to pass upon the reasonableness of the rate from Madera to El Paso". This ruling was made despite the fact that the foreign factor of the combination rate carried the traffic across the international boundary into El Paso.

Arizona Lumber & Timber Co. v. *A.E. R.R. Co.* (1925), 96 I.C.C. 203, involved rates on lumber articles from points in the United States to points in Mexico. There the Commission treated Naco and Nogales, Arizona, as international border points. The Commission stated that the factor within the United States had not been shown to have been unreasonable, and held that it was without power to award reparation with respect to the charges accruing to the Mexican line. In short, it held itself without jurisdiction over a rate factor applying from Nogales, Arizona, to a point in Mexico, and without jurisdiction over the railroad performing that transportation.

Thannhauser & Co. v. *Southern Pac. Co.* (1929), 159 I.C.C. 747, involved combination rates on paper-bag linings from San Francisco, Calif., to destinations in Mexico. The report states:

> "A combination rate was charged, composed of a factor to Nogales, Ariz., and a factor from Nogales, Mexico, to Puga. We are without authority over the

> Mexican factor. The only question to be determined is whether the factor from San Francisco to Nogales, Ariz., was unreasonable." (p. 747)

In *Fruit Importers* v. *Atlantic Coast Line R. Co.* (1932), 188 I.C.C. 520, the Commission was asked to prescribe reasonable rates for the future on fruit from points in Florida "to Rouses Point, N. Y., and other international border crossings" on shipments destined to Montreal. The Commission stated:

> "The factor of the combination rate applicable from Rouses Point at the border to Montreal and used to make up the lowest combination basis is published and on file with us but is not subject to the provisions of the Act." (p. 524)

E. J. Stanton & Son v. *Atchison, T. & S. F. Ry. Co.* (1944), 258 I.C.C. 315, involved rates on lumber from Los Angeles, Calif., to Canadian destinations. The Commission pointed out (p. 317) that the United States factors applied to Port Huron, Detroit, Buffalo, and Rouses Point, and then stated:

> "These rates to the border points were published to apply on that part of the through transportation to destinations in Canada which takes place within the United States. Carriers may publish reasonable rates applicable to the international boundary, in which event they are answerable only for those rates. *Cyanamid and Cyandide From Niagara Falls*, 155 I.C.C. 488, 491." (p. 318)

In other words, Port Huron, Detroit, Buffalo and Rouses Point were treated, for all practical purposes, as the international boundary.

Appendix C.

Hoffman-Taff, Inc. v. St. Louis-S. F. Ry. Co. (1950), 279 I.C.C. 710, involved combination rates from Canadian origins to Springfield, Mo., the first factors of which applied to Detroit and Port Huron, Michigan. The Commission stated the applicable principle and applied it thusly:

> "Under section 1 of the act, our jurisdiction applied to this transportation only insofar as it took place within the United States. It is well settled that railroads within this country have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates, or they may participate in joint through international rates and become jointly and severally liable for any unlawfulness found in such rates. *Cyanamid and Cyanide from Niagara Falls*, 155 I.C.C. 488. On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, *which for all practical purposes are international-border points*, applied. Only the Canadian rates, as factors of the through combinations, are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction. See, *Canada Glue Co.* v. *Canadian National Rys.*, 253 I.C.C. 801 (not printed in full)." (Italics supplied.)

In *Dow Chemical Co.* v. *Alton & S. R.*, 284 I.C.C. 365, a proceeding involving northbound international traffic subject to combination rates made over Port Huron, Mich., the Commission referred to Port Huron as "*the last station in the United States on the route of movement*", and held that it might determine only the lawfulness of the factor applicable to the transportation within the United States, citing *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I.C.C. 710. (Italics supplied.)

Elliott Packing Co. v. *Duluth, W. & P. Ry. Co.* (1954), 292 I.C.C. 12, involved rates on shipments of horses from various Canadian origins to Duluth, Minn. The report indicates that combination of rates made over the international border applied without indicating where the Canadian factor ended and the United States factor began. The Commission there stated:

> "Section 1(2) of the Interstate Commerce Act provides, in substance, that the provisions of the act shall apply to the transportation of passengers and property, but only insofar as such transportation takes place within the United States. In proceedings wherein the jurisdiction of the Commission over rates and charges on international traffic was considered, *it has been uniformly concluded* that the railroads of this country have a clear alternative in respect of their participation in such traffic. They may participate in joint rates with the Canadian railroads and thus become jointly and severally liable for any damages resulting from unlawfulness found in such rates, or they may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates. *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry Co.*, 279 I.C.C. 710, 712; *Dow Chemical Co.* v. *Alton & S. R.*, 284 I.C.C. 365. The Commission is without power to determine the applicability or reasonableness of the rates or charges from the Canadian origins to the border points". (p. 13) (Italics supplied.)

Appendix C.

Albee Fruit Co. v. *Atlantic Coast Line R. Co.* (1955), 293 I.C.C. 785, involved fresh fruits and vegetables from points in the South to Montreal, the applicable rates being combination rates made over Rouses Point, N. Y. Referring to Rouses Point as "the international boundary" and to the combination rates involved as being "based on border points", the Commission held:

> "The jurisdiction of this Commission over international traffic is limited to such transportation only insofar as it takes place in the United States. We have no jurisdiction over that portion of the transportation from the international boundary to Montreal. It is well settled that railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable only for those rates, or they may participate in joint through rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v *New York Central R. Co.*, 275 U. S. 179 and *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U. S. 654. The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points".

Endicott-Johnson Corp. v. *Akron, C. & [illegible]. R. Co.* (1957), 300 I.C.C. 373, involved rates on hides, including certain international rates. With respect to the latter, the Commission stated:

> "Rates assailed to points in Canada are combination rates, composed of factors applicable to Northgate and Portal, N. Dak., which are international boundary points, and to factors for transportation beyond, in Canada. Our consideration must be con-

fined to the rate factors for the movements within the United States." (p. 384)

Conrad Fafard, Inc. v. *Canadian National Rys.* (1957), 302 I.C.C. 163, involved shipments of straw from Canadian origins to United States destinations. There the Commission stated:

> "The defendant Canadian National Railways appeared specially and moved that the complaints as to that carrier be dismissed for lack of jurisdiction. The shipments originated by the petitioner and by the other Canadian carrier defendant, the Canadian Pacific Railway Company, were interchanged with domestic carriers at either Port Huron or Detroit, Mich., *which interchange points have been regarded by this Commission for all practical purposes as the international boundary. Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I.C.C. 710. The motion is granted, and the complaints as to these carriers are dismissed." (p. 163) (Italics supplied.)

In *Yellow Jacket Boat Co., Inc.* v. *Atchison, T. & S. F. Ry. Co.*, decided January 21, 1958, 302 I.C.C. 657, the Commission was called upon to determine the lawfulness of rates on boat shapes originating at Mahone Bay, Nova Scotia, Canada, destined to Denison, Texas. The rates charged for the entire transportation reflected a triple combination of rates, made up of a factor applicable wholly within Canada from Mahone Bay, Nova Scotia, to Windsor, Ontario, a rate from Windsor, Ontario, to Detroit, Michigan, and a rate from Detroit to Denison, Texas.

In the unanimous *Report of the Commission on Reconsideration* in that proceeding*, 305 I.C.C. 113, decided October 30, 1958, the Commission made its conventional statement (p. 116) that "domestic carriers have a statutory duty to establish just and reasonable rates to and from the international boundaries, or to participate in just and reasonable *joint* through rates * * *." It stated (p. 117) that where "shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary". It accordingly found that rates "from the *border points on or near the international boundary* * * *" were and for the future would be unjust and unreasonable to the extent that they exceeded or might exceed a class 50 rate "from the *international boundary near Detroit* to Denison * * *."**

---

* Commissioner Arpaia was necessarily absent and did not participate in its disposition.

** Emphasis supplied.

APPENDIX D

A digest of joint rate cases in which the Commission declined to take jurisdiction over foreign railroads and the transportation they performed on traffic interchanged with American railroads at border points within the United States

The leading Commission case on this subject is *Black Horse Tobacco Co.* v. *I. C. R.R. Co.* (1910), 17 I.C.C. Rep. 588, involving a joint rate on tobacco applicable from points in Kentucky to Monterey, Mexico. The report notes (pp. 589-590) that the shipments involved were carried by the United States carriers to Laredo, Texas, and that the Mexican railroad carried the shipment from Laredo, Texas to Monterey, Mexico. On the question of the Commission's jurisdiction to determine the lawfulness of the joint international rate for the purpose of awarding reparation, the Commission held:

> "Every carrier party to a joint rate is jointly and severally responsible for that rate. *Osborne* v. *C. & N. W. Ry. Co.*, 48 Fed. Rep., 49; *Interstate Commerce Commission* v. *L. & N. R.R. Co.*, 118 Fed. Rep., 613. Those carriers who actually participate in the transportation under a joint rate are jointly and severally liable in damages for the unreasonableness of that rate. *Nicola, Stone & Myers Co.* v. *L. & N. R.R. Co.*, 14 I.C.C. Rep., 199. Should the same rule be applied where the transportation is partly in a foreign country and where one of the carriers participating in the joint rate is a foreign railway which has not concurred in the tariff establishing that rate?
>
> "The act to regulate commerce confers jurisdiction over common carriers engaged in the transportation of persons or property from any place in the United States to an adjacent foreign country. That act further provides that 'All charges made for any service rendered or to be rendered, in the transportation

> of passengers or property, as aforesaid,' shall be just and reasonable. These American carriers are therefore under requirement to impose reasonable charges for the transportation before us.
>
> "If the American line saw fit, it might doubtless name a rate to the Mexican border, and in that event we could deal only with the service up to the Mexican line. Instead of adopting that course the American carriers, in connection with the Mexican carrier, established a joint charge for the entire service from the point in the United States to the point in Mexico, and gave no information as to the part of that charge which would accrue to the American roads. This does not relieve the American carriers from obligation to impose a reasonable charge for their service; it does make it impossible for the Commission to determine the reasonableness of that charge, except by examining the entire through rate.
>
> "Clearly, we have no authority to establish a rate of transportation in Mexico; nor to order the maintenance of a rate for the future from a point in the United States to a point in Mexico; but we may require the American carriers to cease and desist from continuing to apply a joint through rate, or any rule, regulation, or practice in connection with that joint through rate, and we may, where such rate has been voluntarily maintained, inquire whether it has been reasonable, and if found unreasonable, award damages in that behalf." (pp. 590-591)

In *International Paper Co.* v. *D. & H. Co.* (1915), 33 I.C.C. 270, the Commission was called upon to consider the alleged unlawfulness of joint rates on pulpwood from Canadian origins to destinations in New York. The report there noted that the Delaware and Hudson Railroad received the traffic involved from its Canadian connections at Rouses Point, N. Y., "about one mile south of the international boundary," and that the New York Central received the traffic from its Canadian connection at Massena Springs, N. Y., "*about 20 miles from the boundary line via the route of movement,*"[*] although the air-line distance from Massena Springs to the boundary was about six miles. The Commission stated:

> "It is well settled by numerous decisions that the extent of our authority in connection with transportation to an adjacent foreign country is over that portion of the transportation within the confines of the United States. *Black Horse Tobacco Co.* v. *I. C. R. R. Co.*, 17 I.C.C. 588; *Humboldt S. S. Co.* v. *White Pass & Yukon Route*, 25 I.C.C. 136; *Fullerton Lumber & Shingle Co.* v. *B. B. & B. C. R. R. Co.*, 25 I.C.C. 376; and *Rates on Soda Ash and Other Commodities*, 28 I.C.C. 613.
>
> * * * * *
>
> "We can not require the maintenance of joint rates from Canada into the United States nor control the charges that carriers in Canada may make for transportation services in that country. We might require the defendants to cease and desist from continuing the joint rates complained of and to establish their own rates for the service within the United States. The traffic would then move on combinations of rates."

Even though the Canadian railroads carried the traffic to Rouses Point and Massena Springs, N. Y., about 1 mile *and 20 miles*, respectively, beyond the border, the Commission declined to exercise jurisdiction over those carriers, describing that transportation as "*transportation of freight to the border.*" (Italics supplied)

---

[*] Italics supplied.

Appendix D.

Similarly, the Commission held in *Fairmont Creamery Co.* v. *Adams Express Co.* (1917), 43 I.C.C. 724, that it lacked jurisdiction to determine the lawfulness of joint through express rates on cream from points in Canada to "Buffalo, a port of entry", Buffalo also being the final destination. On the authority of this case, the Commission dismissed the complaint in *Booth Fisheries Co.* v. *American Express Co.* (1917), 45 I.C.C. 363, wherein a rate on fresh fish from Selkirk, Manitoba, to Buffalo, N. Y., was assailed as unlawful. The Commission there said:

> "The shipments in question moved over the lines of the Dominion Express Company to Hamilton, Ontario, thence over the lines of the American Express Company through Bridgeburg, Ontario, to Buffalo. It thus appears that this case falls within the principle announced in *Fairmont Creamery Co.* v. *Adams Express Co.*, 43 I.C.C. 724, and other cases there cited. The Commission's jurisdiction extends over that part of the transportation performed within the United States, but the facts of record do not justify a finding of unreasonableness or undue discrimination in the charges with respect to the transportation within our jurisdiction. The complaint will therefore be dismissed and an order will be entered accordingly."

Carey Mfg. Co. v. *G. T. W. Ry. Co.* (1915), 36 I.C.C. 203, involved rates on asbestos sand from Robertson, Thetford, and Sherbrooke, Province of Quebec, to Lockland and Rockdale, Ohio. The Canadian carriers carried the freight across the border to Detroit and Port Huron, Michigan. Those carriers challenged the Commission's jurisdiction to pass upon the rates complained of. The Commission held:

> "* * * we cannot prescribe joint through rates from Canada into the United States, but we can con-

> trol the rates which the American lines charge from the *ports of entry* in the United States to destinations in the United States, whether they are joint rates or separately established rates applicable to the through transportation. *Our jurisdiction attaches at the ports of entry in this country.* * * *"

It thereupon stated that—

> "an order will be entered requiring the *defendants subject to our jurisdiction* to establish, in lieu of the present rates, joint and local rates *from the ports of entry* which shall be no higher to Lockland or Rockdale than to Chicago or Milwaukee. * * *" (Italics supplied)

In *International Nickel Co.* v. *Director General* (1922), 66 I.C.C. 627, the Canadian carrier challenged the Commission's jurisdiction to award reparation against it for any portion of the charges which it received for the haul in Canada. Although the Canadian carrier carried the freight from Port Colborne, Ontario, across the border into the United States, interchanging it with its United States connections at Black Rock and Suspension Bridge, N. Y. the Commission nevertheless sustained the Canadian carrier's objection to jurisdiction over it by directing the United States carriers alone to pay the reparation.

With respect to the amendments to Section 1 made by the Transportation Act of 1920, the report states (p. 629):

> "It is said that the amendments made by the transportation act, 1920, in section 1 of the act to regulate commerce, as amended, have changed or restricted the jurisdiction which was theretofore vested in us by that section. These amendments carry out territorial jurisdiction up to the international boundary line, at which that of Congress itself halts. Our territorial jurisdiction as to foreign commerce is thus coextensive

with that of the federal government. No act of Congress has force of law beyond that boundary line, but up to it, as everywhere else within the United States, the interstate commerce act has full effect just as the federal control act had effect when these shipments moved."

Ontario Paper Co. v. C. N. Rys. (1924), 95 I.C.C. 66, involved joint rates applying on newsprint paper from Thorold, Ontario, a point on the Canadian National Railways, to New York, N. Y. The report notes (p. 67) that Thorold is 30 miles from Black Rock, N. Y., and 12 miles from Suspension Bridge, N. Y., where connections are made with United States railroads.

The Commission found the assailed rates unjust and unreasonable, and awarded reparation against the United States carriers over the objections of the United States defendants.

The defendants renewed their objection to the Commission's jurisdiction in the matter, and in the *Report of the Commission on Reargument*, 102 I.C.C. 365, 367, the entire Commission ruled as follows:

> "The question of our jurisdiction to award reparation on shipments from a foreign country to the United States was also touched upon in the reargument. We deem this question to be controlled by our decision in *International Nickel Co. v. Director General*, 66 I.C.C. 627. In view of its frequent recurrence it seems advisable to repeat our observation in that report that a review of our ruling in the courts would be desirable for future guidance. For the reasons given in our original report in the instant case we see no necessity for making separate findings concerning that portion of the transportation under consideration which is wholly within the United States."

Appendix D.

At the suggestion of the Commission its ruling was made the subject of court litigation. In *News Syndicate Co.* v. *N.Y.C.R.R.* (1927), 275 U. S. 179, the Supreme Court observed (p. 185) that the Canadian National Railways carried the traffic into the United States and interchanged it with the United States railroads at Black Rock and Suspension Bridge, N. Y. *This Court nevertheless described that transportation* (p. 187) *as "transportation from Thorold to the international boundary"*.

In *Spanish River Pulp & Paper Mills* v. *A. & W. Ry. Co.* (1926), 113 I.C.C. 343, the Commission found joint rates on newsprint paper from Espanola, Ontario, to various destinations in the United States unreasonable and unduly prejudicial. The United States carriers were directed to cease and desist on or before a certain date and thereafter to abstain from participating in "publishing, demanding, or collecting joint rates higher than those so limited."

The defendants challenged the Commission's jurisdiction to determine the lawfulness of an *international joint rate* on the ground that the order went further than to require the American lines to withdraw from any *joint rate* and publish and maintain a rate from the boundary, and that the Commission had undertaken to fix for the future a *joint international rate.* In the *Report of the Commission on Reconsideration* (1927), 120 I.C.C. 251, the Commission made it clear that it had no jurisdiction over the *Canadian railroads* despite the fact that they carried the freight across the boundary into the United States and interchanged it with the United States carriers at Sault Ste. Marie or Detroit, Mich., stating:

> "This affirmance and the order we make effective, we may repeat, do not and can not affect, directly or indirectly, and we are not concerned with, the rates which the Canadian Pacific may elect to maintain, or

> which the Board of Railway Commissioners for Canada may approve or prescribe, for application to the transportation from Espanola to the Soo of either local or through traffic." (p. 255)

In the *Report of the Commission on Further Argument in Cyanamid and Cyanide From Niagara Falls* (1929) (155 I.C.C. 488), the Canadian carrier carried the freight from Niagara Falls, Ontario, across the border to Suspension Bridge, N. Y. The Commission held:

> "The interstate commerce act, from which we derive our powers, by its terms is applicable to transportation 'from or to any place in the United States to or from a foreign country', and to common carriers engaged in such transportation, 'but only in so far as such transportation takes place within the United States.' Manifestly our jurisdiction must be so limited, for Congress could not confer upon us jurisdiction in respect of transportation wholly within a foreign country." (p. 490)
>
> "We adhere to the view first expressed in *Black Horse Tobacco Co. v. I.C. R.R. Co.*, 17 I.C.C. 588, that the United States lines have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates *applicable* to or from the border, in which event they are answerable only for those rates. Or, they may become parties to joint rates covering the entire transportation, in which event they become jointly and severally liable for any unlawfulness in such rates. We have jurisdiction over the United States carriers. We have jurisdiction over a portion of the transportation. If in such circumstances the United States carriers enter into a joint undertaking and participate in a rate which is an entity, in respect of such transportation,

> we entertain no doubt that our control over them empowers us to require them to cease and desist from participating in an existing joint rate, or to find their participation in a proposed joint rate not justified, if we find such rates are or will be unreasonable or otherwise unlawful. The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. But proof should not be confused with responsibility." (pp. 491-492)

Crelinsten, M. & Sons v. *Railway Express Agency, Inc.* (1934), 201 I.C.C. 284, involved the lawfulness of rates on strawberries from Florida origins to Quebec, the United States ports of exit being "Rouses Point, N. Y., or Highgate Springs, Vt., points a few miles south of the international boundary". The Commission regarded the transportation from Florida to Rouses Point, N. Y., or Highgate Springs, Vt., as all of the transportation taking place within the United States, observing that "practically all of the transportation north of Rouses Point and Highgate Springs was in Canada", and stating that "we have no jurisdiction over that portion of the transportation from the international boundary to Montreal". Actually, the distance from Highgate Springs, Vt., to the international boundary was 3.5 miles, yet the Commission treated it, for all practical purposes, as the actual international boundary.